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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1970

FEBRUARY 19 THROUGH APRIL 5, 1971

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

396 U. S. 835, No. 311, line 4: "113" should be "133."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, THURGOOD MARSHALL, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

June 9, 1970.

(For next previous allotment, see 396 U. S., p. IV.)

TRIBUTE TO CHIEF JUSTICE WARREN (RETIRED)

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 22, 1971

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN.

THE CHIEF JUSTICE said:

Before we hear arguments in the first case today I have a pleasant task, if it can be called that. This is the nearest sitting of the Court to Friday, the 19th of March, and that was an important day because it marked the 80th birthday of the very distinguished former Chief Justice of the United States, Earl Warren.

This is another milestone in his great career of public service which extends over a period of more than a half century. Chief Justice Warren presided over this Court for a few months short of 16 years and in one of the most important periods in the history of the Court and the country.

I know that I speak for every one of my colleagues on the bench and for Mr. Justice Reed and Mr. Justice Clark, retired, when I say for the record, and to you, Sir, Chief Justice Warren, that we wish you the best of everything in the years ahead and many, many more years of the vigorous good health which you have always enjoyed and our very best wishes to you and to Mrs. Warren on the occasion of your 80th birthday.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1970

BAIRD *v.* STATE BAR OF ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 15. Argued December 8–9, 1969—Reargued October 14, 1970—Decided February 23, 1971

Petitioner, who had passed the Arizona written bar examination, listed all the organizations to which she belonged since age 16 on the Bar Committee questionnaire, but refused to answer the question (No. 27) whether she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence." The committee declined to process her application further or recommend her admission to the bar. The Arizona Supreme Court denied her petition for an order to show cause why she should not be admitted to practice law. *Held:* The judgment of the Arizona Supreme Court is reversed and the case is remanded. Pp. 5–10.

Reversed and remanded.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that views and beliefs are immune from bar committee inquisitions designed to lay a foundation for barring an applicant from the practice of law, which is a matter of right for one qualified by learning and moral character. Pp. 5–8.

(a) A State's power to inquire about a person's beliefs or associations is limited by the First Amendment, which prohibits a State from excluding a person from a profession solely because of membership in a political organization or because of his beliefs. Pp. 5–6.

(b) While Arizona has a legitimate interest in determining whether petitioner's character and professional competence qualify her to practice law, petitioner has supplied the Bar Committee with extensive personal and professional information to assist its determination. Pp. 6–7.

MR. JUSTICE STEWART concluded that Question 27 is constitutionally infirm under the First and Fourteenth Amendments as it is not confined to knowing membership in any organization that advocates violent overthrow of the Government, and it is an inquiry into the proscribed area of political beliefs. Pp. 9–10.

BLACK, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 9. HARLAN, J., filed a dissenting opinion, *post*, p. 34. WHITE, J., filed a dissenting opinion, *post*, p. 10. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and HARLAN and WHITE, JJ., joined, *post*, p. 11.

Peter D. Baird reargued the cause for petitioner. With him on the brief were *John P. Frank* and *Paul G. Ulrich*.

Mark Wilmer reargued the cause and filed a brief for respondent.

MR. JUSTICE BLACK announced the judgment of the Court and delivered an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of

[1] The other is No. 18, *In re Stolar*, *post*, p. 23. See also No. 49, *Law Students Civil Rights Research Council* v. *Wadmond*, *post*, p. 154.

States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State Bar*, 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph Schware was denied admission in New Mexico and this Court reversed, with five Justices agreeing on one opinion, three Justices on another opinion, and one not participating. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957). In another case an applicant named George Anastaplo was denied admission in Illinois on grounds similar to those involved in *Konigsberg* and *Schware*, and the denial was affirmed by a 5-to-4 margin. *In re Anastaplo*, 366 U. S. 82 (1961). See also *In re Summers*, 325 U. S. 561 (1945). With sharp divisions in this Court, our docket and those of the Courts of Appeals have been filled for years with litigation involving inquisitions about beliefs and associations and refusals to let people practice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas.[2] Usually these denials of employment have not been based on any overt acts of misconduct or lawlessness, and the litigation has

[2] See, *e. g.*, *Adler* v. *Board of Education*, 342 U. S. 485 (1952); *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *United States* v. *Robel*, 389 U. S. 258 (1967).

continued to raise serious questions of alleged violations of the First Amendment and other guarantees of the Bill of Rights.[3]

The foregoing cases and others contain thousands of pages of confusing formulas, refined reasonings, and puzzling holdings that touch on the same suspicions and fears about citizenship and loyalty. However we have concluded the best way to handle this case is to narrate its simple facts and then relate them to the 45 words that make up the First Amendment.

These are the facts.

The petitioner, Sara Baird, graduated from law school at Stanford University in California in 1967. So far as the record shows there is not now and never has been a single mark against her moral character. She has taken the examination prescribed by Arizona, and the answer of the State admits that she satisfactorily passed it. Among the questions she answered was No. 25, which called on her to reveal all organizations with which she had been associated since she reached 16 years of age.[4] This question she answered to the satisfaction of the Arizona Bar Committee. Consequently there is no charge or intimation that Mrs. Baird has not listed the organizations to which she has belonged since becoming 16. In addition, however, she was asked to state whether she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or

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[3] See the cases cited in n. 2, *supra*. See also *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445 (1950) (BLACK, J., dissenting); cf. *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Wilkinson* v. *United States*, 365 U. S. 399 (1961); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969).

[4] App. 18.

violence." [5] When she refused to answer this question, the Committee declined to process her application further or recommend her admission to the bar.[6] The Arizona Supreme Court then denied her petition for an order to the Committee to show cause why she should not be admitted to practice law. We granted certiorari. 394 U. S. 957.

In Arizona it is perjury to answer the bar committee's questions falsely, and perjury is punishable as a felony. Ariz. Rev. Stat. Ann. § 13–561 (1956). In effect this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged "advocates overthrow of the United States Government by force or violence." There may well be provisions of the Federal Constitution other than the First Amendment that would protect an applicant to a state bar from being subjected to a question potentially so hazardous to her liberty. But whether or not there are other provisions that protect her, we think the First Amendment does so here. That Amendment, made applicable to the States by the Fourteenth, forbids any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." Mr. Justice Roberts, in referring to the First Amendment's guarantee of freedom of religion, said:

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304 (1940).

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[5] Question No. 27, App. 18.

[6] Response of the Committee on Examinations and Admissions to Order to Show Cause. App. 4.

See also *Schneider* v. *State*, 308 U. S. 147, 160–161 (1939); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). And we have made it clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945). The protection of the First Amendment also extends to the right of association. As we said in *Schneider* v. *Smith*, 390 U. S. 17, 25 (1968):

> "The First Amendment's ban against Congress 'abridging' freedom of speech, the right peaceably to assemble and to petition, and the 'associational freedom' . . . that goes with those rights create a preserve where the views of the individual are made inviolate."

See also *Shelton* v. *Tucker*, 364 U. S. 479, 485–487 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. *United States* v. *Robel*, 389 U. S. 258, 266 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (1967). Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution. *Shelton* v. *Tucker, supra; Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); Cf. *Speiser* v. *Randall*, 357 U. S. 513 (1958).

When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it

to show that the inquiry is necessary to protect a legitimate state interest. *Gibson* v. *Florida Legislative Investigation Committee, supra,* at 546. Of course Arizona has a legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law. But here petitioner has already supplied the Committee with extensive personal and professional information to assist its determination. By her answers to questions other than No. 25, and her listing of former employers, law school professors, and other references, she has made available to the Committee the information relevant to her fitness to practice law.[7] And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.

Much has been written about the application of the First Amendment to cases where penalties have been imposed on people because of their beliefs. Some of what has been written is reconcilable with what we have said here and some of it is not. Without

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[7] Respondent has argued that even when an applicant has answered Question 25, listing the organizations to which she has belonged since the age of 16, Question 27 still serves a useful and legitimate function. Respondent urges:

"Assume an answer including an organization by name such as 'The Sons and Daughters of I Will Arise.' This could truly be a Christian group with religious objectives. But also it could be an organization devoted to the objectives of Lenin, Stalin or any other deceased person whose teachings and objectives were not conducive to the continued security and welfare of our government and way of life." Brief for Respondent 8.

The organizations petitioner listed in response to question 25 were: Church Choir; Girl Scouts; Girls Athletic Association; Young Republicans; Young Democrats; Stanford Law Association; Law School Civil Rights Research Council. Respondent does not state which of these organizations may threaten the security of the Republic.

detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law. Clearly Arizona has engaged in such questioning here.[8]

The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. See *Schware* v. *Board of Bar Examiners, supra,* and *Ex parte Garland,* 4 Wall. 333 (1867). This record is wholly barren of one word, sentence, or paragraph that tends to show this lady is not morally and professionally fit to serve honorably and well as a member of the legal profession. It was error not to process her application and not to admit her to the Arizona Bar. The judgment of the Arizona Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post,* p. 34.]

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[8] The committee urges that it is entitled to demand an answer to Question 27 because:

"Unless we are to conclude that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to an investigation and interrogation *as to whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." (Emphasis added.) Memorandum in Support of Response to Petition for Order to Show Cause, App. 5–6.

MR. JUSTICE STEWART, concurring in judgment.

The Court has held that under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not as such unconstitutional. *Konigsberg* v. *State Bar*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82.

Question 27, however, goes further and asks applicants whether they have ever belonged to any organization "that advocates overthrow of the United States Government by force or violence." Our decisions have made clear that such inquiry must be confined to knowing membership to satisfy the First and Fourteenth Amendments. See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258, 265–266; *Law Students Civil Rights Research Council* v. *Wadmond*, *post*, p. 154, at 165. It follows from these decisions that mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals. See *Scales* v. *United States*, 367 U. S. 203, 228–230; *Law Students Civil Rights Research Council* v. *Wadmond*, *supra*.

There is a further constitutional infirmity in Arizona's Question 27. The respondent State Bar is the agency entrusted with the administration of the standards for admission to practice law in Arizona. And the respondent's explanation of its purpose in asking the question makes clear that the question must be treated as an inquiry into political beliefs. For the respondent explicitly states that it would recommend denial of admission solely because of an applicant's beliefs that the respondent found objectionable. Cf. *Wadmond*, *supra*, at

162–163. Yet the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs. *E. g., West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304. Cf. *Carrington* v. *Rash,* 380 U. S. 89, 94.

MR. JUSTICE WHITE, dissenting.*

I am quite unable to join the opinions of MR. JUSTICE BLACK announcing the judgments of the Court in these cases. It is my view that the Constitution does not require a State to admit to practice a lawyer who believes in violence and intends to implement that belief in his practice of law and advice to clients. I also believe that the State may ask an applicant preliminary questions that will permit further investigation and reasoned, articulated judgment as to whether the applicant will or will not advise lawless conduct as a practicing lawyer.

Arizona has no intention of barring applicants based on belief alone. This my Brother BLACKMUN makes quite clear. Its inquiries were designed to ascertain whether an applicant expects actively to support illegal violence or espouses an activist role in implementing that idea.

Ohio takes much the same approach, and in my view both States are right. If, as a preface to further questions, New York may ask whether an applicant is a knowing member of the Communist Party, although that fact alone would not be ground for exclusion, see *Law Students Civil Rights Research Council* v. *Wadmond, post,* p. 154, Arizona and Ohio may ask about simple membership for the same justifiable reason. And if investigation reveals the applicant to be actively furthering the illegal

*[This opinion applies also to No. 18, *In re Stolar, post,* p. 23.]

activities of any group or to be without comprehension that advising lawless conduct is incompatible with professional standards, the State should be able to deny admission to the Bar.

As MR. JUSTICE BLACK's opinions hasten to assure us, a State may assure itself of an applicant's "qualities of character" and educational qualifications. Accordingly, it would be entitled to make an assessment of his "honesty" and refuse to license him if firmly convinced by his responses or other record evidence that he would not conform to the standards of integrity expected of the members of the Bar. Neither should it be required to admit to practice a person who believes in violent conduct to achieve social, political, or other ends and who is currently and actively supporting such activities or who expects to do so in the course of advising clients in his professional role. I thus see no constitutional basis for forbidding the asking of perfectly relevant questions designed to ascertain whether an applicant considers it the proper role of the lawyer, as practitioner, to advise and advocate violence as a means for settling disputes or achieving social or political ends. I therefore dissent from the judgments in both of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE join, dissenting.

This, for me, is not at all a case involving mere personal beliefs on the part of Sara Baird.

I have necessarily assumed, and I trust not erroneously, that *Konigsberg* v. *State Bar*, 366 U. S. 36, and *In re Anastaplo*, 366 U. S. 82, both decided on April 24, 1961, have remained good law despite the Court's then close division (Justice HARLAN and Justices Frankfurter, Clark, Whittaker, and STEWART in the majority; Justice BLACK and Chief Justice Warren, and Justices

DOUGLAS and BRENNAN, dissenting). Neither case has ever been expressly overruled. Neither is now expressly overruled. In each of the cases the Court decided, at the very least, as MR. JUSTICE STEWART puts it in his separate concurrence here, that "under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not as such unconstitutional."

I think the Court really decided more than that. I say this because (a) in *Konigsberg* the applicant had "reiterated unequivocally his disbelief in violent overthrow, and stated that he had never knowingly been a member of any organization which advocated such action," 366 U. S., at 39; (b) the Court stated that it thought it "clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications," 366 U. S., at 44; that:

> "We likewise regard as untenable petitioner's contentions that the questions as to Communist Party membership were made irrelevant either by the fact that bare, innocent membership is not a ground of disqualification or by petitioner's willingness to answer such ultimate questions as whether he himself believed in violent overthrow or knowingly belonged to an organization advocating violent overthrow," 366 U. S., at 46;

and that:

> "It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants

> for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions. . . .
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> . . . . . .
>
> "[W]e regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented," 366 U. S., at 51–52;

and (c) in *Anastaplo* it was observed:

> "We have also held in *Konigsberg* that the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment." (Footnote omitted.) 366 U. S., at 89.

Petitioner Baird, however, attacked the integrity of these cases before the Arizona court and again attacks their integrity here and claims that, although perhaps distinguishable, the cases "warrant . . . delimiting, and perhaps even overruling in light of the trend since 1961." In my view, Mrs. Baird has now had striking success in her overruling endeavor despite the seeming recognition of the two cases in the opinion of the plurality for reversal (hereafter plurality) and the separate concurrence's definite bow in their direction.

The present case comes here, after argument for the second time, in a stark and clear posture. Mrs. Baird, applicant for admission to the Bar of the State of Arizona, possessor of an academic degree from Colorado College, and possessor of a degree in law from Stanford

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University, *refuses* to answer, other than to say "Not Applicable," the 27th inquiry of a questionnaire which the Arizona Supreme Court, by rule, has made a part of the application for membership in the State Bar.[1] That question reads:

> "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

The applicant bases this refusal (a) on the fact that in her answer to a preceding inquiry, the 25th, she listed the organizations of which she had been a member since age 16, and (b) on the asserted legal propositions that to compel her to answer is to deny her First Amendment rights of freedom of belief and freedom of association, her Fifth Amendment right not to incriminate herself, and her Fourteenth Amendment right to due process.

In my view, applicant Baird vastly overstates her case. On this record, I would affirm the judgment of the Supreme Court of Arizona in denying Mrs. Baird's petition for admission to practice law in the State's courts.

There are several factors that prompt my conclusion:

1. Mrs. Baird is an intelligent and knowledgeable person. She holds a college degree and a graduate degree, and, as is assumed here, she has demonstrated in the Bar examination an acceptable knowledge and mastery of the law. There is no claim of vagueness or lack of awareness on her part of precisely what Question 27 meant or of what it was intended to probe. The applicant obviously knew the scope of the question and its

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[1] See 102 Ariz. XXIV, XXIX, and XXXVII, for the pertinent provisions of Rule 28 (c) in effect at the time Mrs. Baird submitted her application. The rule was amended, effective August 1, 1970, in ways not relevant here. See 106 Ariz. XXXI.

concern with the Party and with forceful and violent overthrow of the Government.

2. Mrs. Baird's use of the "Not Applicable" response to Question 27 is not fully understandable. Of course, she may have so phrased that answer hurriedly in the passing thought that, with her listing of organizations in response to Question 25, buttressed by the statement, "This list includes all organizations that I can recall at this time," and with those organizations on the list obviously not within the contemplation of Question 27, the latter question was, indeed, "not applicable." After all, she did employ the same "not applicable" answer on the form in no less than 16 other places; most of these, because of their conditional context, could well have been left blank and would have been expected to be left blank, despite the general instruction that all questions were to be answered.

Nevertheless she did respond to the inquiry in that manner and, as her brief states, she now has "declined to answer" the question. This, then, leaves this litigation in the posture where the response to Question 27 was not inadvertent and was not the product of any misunderstanding or mistake, where an answer is now flatly refused, and where the applicant, perhaps somewhat defiantly, is content to have the record remain as it is and to have her case won or lost on that record. This is reminiscent of the obstructionist tactics condemned in *Konigsberg* and *Anastaplo*.

3. For Mrs. Baird to say that because she had answered Question 25 and had listed her organization memberships since age 16 she need not respond to Question 27 is no answer at all.[2] To answer the one question fully and to refuse to respond to the other embraces an obvious

[2] The majority, of course, obviously would hold that Question 25 also was impermissible. *In re Stolar, post,* p. 23. Mrs. Baird, however, appears to have had no hesitancy in answering that inquiry.

inconsistency of position, for the two questions are related. Furthermore, the questions are not duplicative. By her refusal to answer Question 27, she would place on the Arizona Committee on Examinations and Admissions [3] and on the Supreme Court of Arizona the burden of determining which of the organizations she listed, if any, was an arm of the Communist Party or advocated forceful or violent overthrow of the Government. That, however, is not the task of the Committee or of the Arizona Supreme Court. It is Sara Baird's task. It is a truism, I think, that the Communist endeavor works beneath the surface as well as in the open and that high-sounding names have been the front and the verbal shield for something very different from what the name imports.

4. No one is in a better position to know the aim and purpose and advocacy of an organization than a member. Certainly the Committee and the Arizona Supreme Court, which have other things to do, are not equipped for the task of checking out the identity of every named organization, especially one which might follow the standard of the less said and known, the better. And Mrs. Baird would place this burden on the Committee by submitting partial answers. She gives the appearance of playing a game. The importance of the subject deserves better than that.

5. It has been said that the burden is on the applicant. *Application of Courtney*, 83 Ariz. 231, 233, 319 P. 2d 991, 993 (1957). But a most minimal burden it is. Had she answered "None" to Question 27, that would have been the end of the matter in the absence of obvious prevarication. If she were in doubt, the answer "None to my knowledge" would have accomplished the same result. She chose neither answer. She chose, instead, to remain silent and less than candid.

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[3] See Arizona Supreme Court Rule 28 (c).

6. The plurality opinion, I feel, fails to place the issue in exact focus. This is not a situation where, as that opinion states, and even would do so in a perjury context, "In effect this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged 'advocates overthrow of the United States Government by force or violence.' " It falls far short of guesswork. Mrs. Baird either knew the answer or she did not know it. If she knew, she coupled her knowledge with an attempt to conceal. If she did not know, she had only to state her lack of knowledge. This was no "guess" and, absent the intent to deceive, it certainly was no guess fraught with the risks of perjury.

7. Although Question 27, concededly, would have been better phrased had it gone on to inquire as to the applicant's own knowing participation in, and promotion of, illegal goals, a realistic reading of the question discloses that it is directed not at mere belief but at advocacy and at the call to violent action and force in pursuit of that advocacy. Contrary to the plurality opinion's conclusion and to that of the separate concurrence, I find nothing in this record that indicates that Mrs. Baird automatically would have been denied admission to the Bar had she answered Question 27 in the affirmative. The record, and the Committee's brief here,[4] disclose exactly the

[4] "The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character

opposite. In its Memorandum, filed with the Arizona court in support of its response to the order to show cause, the Committee stated that no judgment as to recommendation or nonrecommendation for admission had been made; that an affirmative answer to Question 27 would lead to further inquiry as to Mrs. Baird's expectation actively to support the objective of violent overthrow; and that, if her membership is of a nominal character and she does not participate in the advocacy views, there would be no legal basis for refusing a recommendation for admission.[5] The material quoted in the

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and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission to practice law under the decisions of the United States Supreme Court . . . ." Respondent's Brief 2.

"The Committee, contrary to the repeated assertions and insinuations to the contrary in Petitioner's Brief, has also made it abundantly clear that *regardless of the political beliefs and views of Sara Baird it is only if she is found to actively believe in the notion and espouses an activist role in implementing the notion that our government be destroyed by force and violence* that a favorable recommendation will be refused her by the Committee. . . ." Respondent's Brief 3.

"The Committee has not and cannot in good conscience certify to the Arizona Supreme Court that Sara Baird has the character and moral fitness to practice law if she does actively support and advocate the overthrow of the Government of the United States by force and violence." Respondent's Brief 6.

"The issue is simple. 'Is one who believes in and who is willing to work to undermine and destroy the Government of the United States qualified to be admitted to the practice of law?' " Respondent's Brief 13.

[5] The Memorandum states as its conclusion:

"The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the over-

plurality opinion's footnote 8 is from the body of the Memorandum; my reading of that material, however, indicates only that further inquiry is then in order. I do not share the opinion's interpretation of that material as being directed to mere belief. The key words are whether "violent overthrow . . . is something to be sought after." That is an inquiry into willingness to participate in violence.

8. There is talk, of course, in the briefs here about whether admission to the Bar and receiving authority to practice law is a "right" or a "privilege." I am old enough and old-fashioned enough always to have regarded it more as a privilege than as a right. I at least thought that was the tradition. A century ago Mr. Justice Field referred to the practice of law by a *qualified* person as a right and not as a matter of the State's grace or favor. *Ex parte Garland*, 4 Wall. 333, 379 (1867). The Arizona court has spoken in similar terms. *Application of Klahr*, 102 Ariz. 529, 531, 433 P. 2d 977, 979 (1967). It could oppositely be stated, with just as much accuracy, as the Bar in its brief here asserts,[6] that "one qualified by character, integrity and learning has the right to practice law." Indeed, this is precisely the way the Arizona court has phrased it: "[T]he practice of law is not a privilege but a right, conditioned solely on the requirement that a person have the necessary mental,

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throw of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission to practice law . . . ."

[6] Respondent's Brief 15.

physical and moral qualifications." *Application of Klahr*, 102 Ariz., at 531, 433 P. 2d, at 979. See also *Application of Levine*, 97 Ariz. 88, 90–91, 397 P. 2d 205, 206–207 (1964), and *Application of Burke*, 87 Ariz. 336, 339, 351 P. 2d 169, 172 (1960).

The characterization of Bar admission as a right or as a privilege may be little more than an exercise in semantics. It seems to me that, whichever it may be, the State, in granting the authority to practice law, with what surely is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood, demands something more of the applicant than a formal certificate of completion of a course of legal study and the ability acceptably to answer a series of questions on a Bar examination. It presumably demands what fundamentally is character. And it is character that a State holds out to the public when it authorizes an applicant to practice law.

9. Judges and Bar Examiners, of course, should hesitate to judge too strictly those seeking entrance to the profession. Certainly the impatience and far-ranging attitudes of youthful years are not, in themselves, disqualifying. That is part of the maturing process, especially for future lawyers who must study, examine, select, and develop their philosophies of life and of their profession. Mr. Justice Frankfurter expressed it well:

> "The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'
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> . . . . .

"History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses and their sense of responsibility 'questionable characters.'" *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 247, 251 (1957) (concurring opinion).

10. An attorney, we sometimes tend to forget, is an officer of the court. *Ex parte Garland,* 4 Wall., at 378. Perhaps we read too much into that phrase. But there is a distinct element of fact and of history in it. We have seen, of late, an overabundance of courtroom spectacle brought about by attorneys—frequently those who, being unlicensed in the particular State, are nevertheless permitted, by the court's indulgence, to appear for clients in a given case—who give indications of ignoring their responsibility to the courts and to the judicial process. Question 27 bears upon this facet of an applicant's character.

11. The plurality opinion acknowledges that Arizona has a legitimate interest in determining whether the applicant has the "qualities of character" requisite for the practice of law. But the opinion then goes on to prescribe when, in its judgment, the applicant has given a sufficient amount of information to the committee. I doubt if this Court is the proper tribunal to judge the sufficiency of material supplied for legal practice in Arizona. Of course there is a constitutional limit, but that

limit is marked by the relevant, by the excesses of unreasonableness and of harassment, and by the otherwise constitutionally forbidden. It should not be marked at an arbitrary point where the applicant, for reasons of convenience or assumed self-protection or contrariness, decides that enough is enough.

12. Finally, the State has a measure of a right to protect itself. Its area of possible vulnerability is nowhere greater than in its courts and in its judicial process. Courtroom events disclosed in recent litigation vividly demonstrate this. See *Illinois* v. *Allen*, 397 U. S. 337 (1970); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). Assurance that applicant Baird at least professes to refrain from forceful and violent overthrow of the Government of which, upon admission, she will become a true and working part, and under which, for better or for worse, she has lived and, judging by her excellent education, has prospered and enjoyed some benefits, is a subject of legitimate inquiry.

As stated above, on this record I would affirm the judgment of the Supreme Court of Arizona.

Syllabus

IN RE STOLAR

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 18. Argued December 9, 1969—Reargued October 14–15, 1970—Decided February 23, 1971

Petitioner, a 1968 law school graduate and a member of the New York Bar, applied for admission to the Ohio Bar. He made available to Ohio all the information he had given the New York Bar Committee, including answers to questions concerning organizations with which he was associated, his loyalty to the Government, and whether he was a member of a group seeking to effect changes in our form of government or to advance the interests of a foreign country. But petitioner refused to answer three questions on the Ohio application on the ground that they infringed his rights under the First and Fifth Amendments: (1) Question 12 (g), which asked whether he was a member of "any organization which advocates the overthrow of the government of the United States by force," (2) Question 13, which asked for a list of all "organizations of which you are or have been a member," and (3) Question 7, which sought a list of all "organizations of which you are or have become a member since registering as a law student." The Ohio Supreme Court approved the bar investigating committee's recommendation that petitioner's application to take the bar examination be denied. *Held:* The judgment of the Ohio Supreme Court is reversed and the case is remanded. Pp. 27–31.

Reversed and remanded.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that it was a denial of petitioner's First Amendment rights to refuse him admission to the Ohio bar simply because he declined to answer questions about his beliefs and associations. *Baird* v. *State Bar of Arizona, ante,* p. 1. Pp. 27–31.

MR. JUSTICE STEWART concluded that Questions 7 and 13 are unconstitutional under *Shelton* v. *Tucker,* 364 U. S. 479, and that Question 12 (g), like Question 27 in *Baird* v. *State Bar of Arizona, ante,* p. 1, is constitutionally infirm under the First and Fourteenth Amendments since it is not confined to knowing membership in any organization that advocates violent overthrow of the Government. P. 31.

BLACK, J., announced the Court's judgment and delivered an opinion in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 31. HARLAN, J., filed a dissenting opinion, *post*, p. 34. WHITE, J., filed a dissenting opinion, *ante*, p. 10. BLACKMUN, J., filed a dissenting opinion in which BURGER, C. J., and HARLAN and WHITE, JJ., joined, *post*, p. 31.

Leonard B. Boudin reargued the cause for petitioner. With him on the briefs was *David Rosenberg*.

Robert D. Macklin, Assistant Attorney General, reargued the cause for the State of Ohio and the Columbus Bar Association. With him on the brief were *Paul W. Brown*, Attorney General, *Shelby V. Hutchins*, and *William H. Schneider*.

MR. JUSTICE BLACK announced the judgment of the Court and delivered an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

This is the second of two cases* involving the refusal of States to admit applicants to practice law because they declined to answer questions relating to their beliefs about government and their affiliations with organizations suspected of advocating the overthrow of government by force. These cases, which concern inquisitions about loyalty and government overthrow, are relics of a turbulent period known as the "McCarthy era," which drew its name from Senator Joseph McCarthy from Wisconsin. We have just referred in our opinion in *Baird* v. *State Bar of Arizona*, *ante*, p. 1, to the confusion and uncertainty created by past cases in this constitutional field. The central question in all of them has been the same, whether involving lawyers, doctors, marine workers,

*The other is No. 15, *Baird* v. *State Bar of Arizona*, *ante*, p. 1. Cf. No. 49, *Law Students Civil Rights Research Council* v. *Wadmond*, *post*, p. 154.

or State or Federal Government employees, namely: to what extent does the First or Fifth Amendment or other constitutional provision protect persons against governmental intrusion and invasion into private beliefs and views that have not ripened into any punishable conduct? Without attempting in that case to bring about a complete reconciliation of all that this Court has previously said about this particular phase of First Amendment protection, we held that under the circumstances present there, Mrs. Baird could not, consistently with the First Amendment, be denied a state license to practice law because she refused to state whether she had belonged to the Communist Party or any organization that advocated overthrow of the United States Government by force. Here we hold that Stolar's refusals to answer certain questions asked him by the Ohio Bar Committee were also protected by the First Amendment.

The facts are these: Stolar, whose home is in Rochester, New York, has an A. B. degree from the University of Rochester and received an LL. B. degree from New York University Law School in 1968. The dean of that school has certified that Stolar has received instructions in legal ethics, has a good moral character, and has sufficient knowledge and ability to discharge the duties of an attorney at law. He has a license to practice law in New York State. To become a member of the New York Bar, Stolar was asked and answered the following questions, along with many others:

> "18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully.
>
> *"I was a Cub Scout and Boy Scout and Explorer Scout during elementary and high school.*
>
> *"I also participated fully in my Temple's religious education programs until I went to college.*

"*In addition, my time spent as a VISTA is a service of the above described nature.*

"19. Do you believe in the principles underlying the form of government of the United States? *Yes.*

"20. *State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country?* If so, state the facts fully. *No.* (Emphasis supplied in part.)

"21. Can you conscientiously, and do you, affirm, without any mental reservation, that you have been and are loyal to the Government of the United States? *Yes.*

. . . . .

"24. (a) Have you studied the Canons of Ethics adopted by the American Bar Association? *Yes.*

"(b) Do you unconditionally subscribe to the same? *Yes.*

"(c) Will you conscientiously endeavor to conform your professional conduct to them? *Yes.*"

In 1969 Mr. Stolar applied to the Ohio Bar for admission to practice. He made available to Ohio all the information he had previously given the New York Bar Committee, including his answers to the New York questions stated above. Stolar then answered a long series of questions posed by the Ohio committee. In response to oral interrogation he stated:

"that he is not now and has never been a member of the Communist Party, of any socialist party, or of the Students for a Democratic Society, and . . . that he has signed the standard U. S. Army preinduction security oath, which has reference to the 'Attorney General's List.'"

However, Stolar declined to answer certain questions on the Ohio application on the grounds they infringed his rights under the First and Fifth Amendments. These questions were:

> "12. State whether you have been, or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . . .
>
> "13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member."
>
> "7. List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student."

Because of his refusal to answer these questions, one member of the committee who investigated Stolar recommended that he be denied admission. The other stated:

> "I found Mr. Stolar to be honest and forthright. His statements evidenced also a certain commitment to principle for its own sake, an unusually great amount of social awareness, and a degree of self-interest not reprehensible. On the basis of the interview and the background actually revealed in Mr. Stolar's applications I have no reluctance to recommend Mr. Stolar for admission to the practice of law."

The full committee then recommended that petitioner's application to take the Ohio Bar examination be denied. The Ohio Supreme Court approved the committee's recommendation without opinion. We granted certiorari. 396 U. S. 816.

We deal first with Ohio's demands that petitioner Martin Stolar list all the organizations to which he has belonged since registering as a law student and those of which he has ever been a member. In our view re-

quiring a Bar applicant to answer these questions is impermissible in light of the First Amendment, as was made clear in *Shelton* v. *Tucker*, 364 U. S. 479 (1960). At issue in *Shelton* was an Arkansas statute that required every state teacher, as a condition of employment, to file an affidavit listing every organization to which he had belonged within the preceding five years. The Court noted that this requirement impinged upon the teacher's right to freedom of association because it placed "pressure upon a teacher to avoid any ties which might displease those who control his professional destiny . . . ." *Id.*, at 486. Similarly here, the listing of an organization considered by committee members to be controversial or "subversive" is likely to cause delay and extensive interrogation or simply denial of admission to the Bar. Respondent committee frankly suggests that the listing of an organization which it felt "espoused illegal aims" would cause it to "investigate further." Law students who know they must survive this screening process before practicing their profession are encouraged to protect their future by shunning unpopular or controversial organizations. Cf. *Speiser* v. *Randall*, 357 U. S. 513 (1958).

The committee suggests its "listing" question serves a legitimate interest because it needs to know whether an applicant has belonged to an organization which has "espoused illegal aims" and whether the applicant himself has espoused such aims. But the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization. *Baird* v. *State Bar of Arizona*, *supra*; *cf. United States* v. *Robel*, 389 U. S. 258, 266 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (1967). Nor may the State penalize petitioner solely because he personally, as the committee suggests,

"espouses illegal aims." See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304 (1940); *Baird* v. *State Bar of Arizona, supra.*

The committee also argues it needs answers to Questions 7 and 13 because responses might direct its attention to persons who have known an applicant and who could supply information relevant to his qualifications. Undoubtedly Ohio has a legitimate interest in determining whether an applicant has "the qualities of character and the professional competence requisite to the practice of law." *Baird* v. *State Bar of Arizona, supra.* But petitioner Stolar, already a member in good standing of the New York Bar, supplied the Ohio committee with extensive personal and professional information as well as numerous character references to enable it to make the necessary investigation and determination. Moreover, even though irrelevant to his fitness to practice law, Stolar's answers to questions on the New York application provided Ohio with substantially the information it was seeking by Questions 7, 12 (g), and 13. The information contained in the two applications included petitioner's law school; every address at which he had ever lived; the names, addresses, and occupations of his parents; the names and addresses of his elementary school, his high school and high school principal; the names of nine former employers (which included three different law firms for which he had done summer work); his "criminal record" (which consisted of two speeding convictions); nine different people as character references (two of whom had known Stolar for more than 20 years); and extensive information about his previous activities (*e. g.*, law school moot court, graduate advisor at N. Y. U., Cub Scout, Boy Scout, Explorer Scout, and his temple's religious education programs).

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We conclude also that Ohio may not require an applicant for admission to the Bar to state whether he has been or is a "member of any organization which advocates the overthrow of the government of the United States by force." As we noted above, the First Amendment prohibits Ohio from penalizing a man solely because he is a member of a particular organization. See also *Baird* v. *State Bar of Arizona, supra.* Since this is true, we can see no legitimate state interest which is served by a question which sweeps so broadly into areas of belief and association protected against government invasion. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940); *United States* v. *Robel,* 389 U. S. 258, 266 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607 (1967); *Baird* v. *State Bar of Arizona, supra; Baggett* v. *Bullitt,* 377 U. S. 360 (1964).

There is not one word in this entire record that reflects adversely on Mr. Stolar's moral character or his professional competence. Although there were three questions that he did not answer with a simple "yes" or "no," he did answer all of the Committee's questions relevant to his fitness and competence to practice law. It is difficult if not impossible to see how the State of Ohio could have been obstructed or frustrated to any extent in determining Mr. Stolar's fitness to practice law by his failure to answer the questions more fully. The record shows a young man who, from his boyhood up, had no adverse marks except for two speeding convictions. He answered numerous prying questions about personal affairs that could hardly have been necessary for a State interested only in whether he would make an honest lawyer faithful to his clients. The questions he did not answer related only to his beliefs and associations, both protected by the First Amendment. The State points to not one overt act on Stolar's part that even suggests a possible reason for denying his appli-

cation. Here, as in *Baird* v. *State Bar of Arizona*, it was a denial of a Bar applicant's First Amendment rights to refuse him admission simply because he declined to answer questions about his beliefs and associations.

The judgment of the Ohio Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE WHITE, see *ante*, p. 10.]

MR. JUSTICE STEWART, concurring in the judgment.

Ohio's Questions 7 and 13 are plainly unconstitutional under *Shelton* v. *Tucker*, 364 U. S. 479. In addition, Question 12 (g) suffers from the same constitutional deficiency as does Arizona's Question 27 in *Baird* v. *State Bar of Arizona*, *ante*, p. 1. For these reasons I agree that the judgment before us must be reversed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE join, dissenting.

This case, also argued here for the second time, presents another instance of a well-educated (academic degree from the University of Rochester; law degree from New York University) and obviously able young person who seeks admission to the Bar, but, to an extent at least, upon his own terms. His case is made the more acute and appealing because he already has been admitted to practice in the State of New York but now finds himself thwarted in a like endeavor in Ohio. The decisions in *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961), and *In re Anastaplo*, 366 U. S. 82 (1961), are again challenged.

The plurality opinion has set forth the pertinent questions asked of Martin Robert Stolar, when he sought admission to the New York Bar in 1968, and Stolar's answers to those questions. At that time he was willing to go so far as specifically to profess even his *belief* in the principles underlying the form of government of the United States and his loyalty to that government, and also, just as specifically, to go so far as to deny that he was, or ever had been, a member of any party or organization pledged to effect changes in the form of our government or engaged in advancing the interest of a foreign country. The propriety of these very questions, which Stolar answered apparently without hesitation in New York in 1968, was seriously questioned subsequently in *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 130 (SDNY 1969), now affirmed, *post*, p. 154.

In 1969, in Ohio, Stolar apparently again had no hesitation in professing at oral interview that he was not, and never had been, a member of the Communist Party. But, although the one seems to include the other, he flatly refused, on stated Fifth Amendment grounds, to say (Question 12 (g)) whether he was or had been a member of any organization which advocates the overthrow of the Government of the United States by force. He also refused, on Fifth Amendment grounds, to list (Questions 13 and 7) organizations of which he was or had been a member.

I may assume, for present purposes, that the general and broadly phrased list-your-organizations inquiries, that is, Questions 13 and 7, are improper and impermissible under the Court's holding, by another five-to-four vote, in *Shelton* v. *Tucker*, 364 U. S. 479 (1960), despite the presence of what seems to me to be a somewhat significant difference between nontenured school teachers and about-to-be-licensed attorneys. This assumption,

however, does not terminate Stolar's case, for Question 12 (g), with its specific inquiry about membership in organizations advocating overthrow by force, remains to be considered.

My position with respect to a refusal to respond to a question such as Question 12 (g) is set forth in my dissent in *Baird* v. *State Bar of Arizona, ante,* p. 11, and needs no detailed repetition here. I note only (a) the inconsistency of Stolar's willingness to respond orally and his unwillingness to respond in writing, and (b) that, here again, membership, present or past, in an organization of the kind specified, although relevant in the Bar admission context, in and of itself is not conclusive upon the issue of admission to the Bar. Ohio concedes, as Arizona did in *Baird,* that the significance lies in something more than mere membership.

Neither am I content with the conclusion reached in the plurality opinion that Stolar's responses to New York in 1968 should suffice for responses to Ohio in 1969. That kind of reasoning would compel one to conclude that because an applicant is admitted to the Bar of one State, he surely must be admitted to the Bar of any other State. We might reach that frontier one day on some new and as yet undeveloped constitutional concept, but I doubt whether we have reached it yet. New York's range of inquiry and her area of particular interest may very well differ from Ohio's, and each may be constitutionally permissible. Further, an answer true in 1968 may not be true at all in 1969. Time passes and changes can take place even within a few months.

Although I readily concede that the Ohio question (just as the Arizona question in *Baird*) could have been better phrased, the approach of the plurality for reversal to the inquiry is, I feel, somewhat unrealistic. As in *Baird,* and as noted above, it is not a mere question of membership present or past. It is a question of knowing

membership and of willingness to participate in the forceful destruction of government. This is the crux. To forestall inquiry at the threshold stultifies Ohio's appropriate concern as to faithful adherence to a lawyer's trust when the State is about to vest great professional and fiduciary power in those who seek entrance to the Bar.

On this record, I would affirm.

MR. JUSTICE HARLAN, concurring in No. 49, *post*, p. 154, and dissenting in No. 15, *ante*, p. 1, and No. 18.

In joining MR. JUSTICE STEWART'S opinion for the Court in the *Wadmond* case, No. 49, *post*, p. 154, and MR. JUSTICE BLACKMUN'S dissenting opinions in the *Baird* case, No. 15, *ante*, p. 11, and in the present case, I am constrained to add these remarks.*

My Brother BLACK'S opinion announcing the judgments of the Court in *Baird* and in the present case, and his dissenting opinion in the *Wadmond* case, could easily leave the impression that the three States involved are denying Bar admission to professionally qualified candidates solely by reason of their membership in so-called subversive organizations, irrespective of whether that membership is born of a purely philosophical cast of mind or of a specific purpose to engage in illegal action, or that these States are at least trying to discourage prospective Bar candidates from joining such organizations. In the latter respect, my Brother MARSHALL'S opinion, *post*, p. 185, seems to me to lend itself to a similar interpretation. If anything in these records could fairly be taken as pointing to either such conclusion, I would be found on the "reversing" side of these cases. The records, however, adum-

*While petitioners in Nos. 15 and 18 have also sought to assert Fifth Amendment claims against self-incrimination, today's opinions have treated all the cases only in terms of First Amendment considerations, and I too shall proceed on that basis.

brated by the representations of the responsible lawyers who appeared for the States, in my opinion belie any such inferences. They show no more than a refusal to certify candidates who deliberately, albeit in good faith, refuse to assist the Bar-admission authorities in their "fitness" investigations by declining fully to answer the questionnaires.

I could hardly believe that anyone would dispute a State's right to refuse admission to the Bar to an applicant who avowed or was shown to possess a dedication to overthrowing governmental authority by force or to supplanting the rule of law by incitement to individual or group violence as the best means of attaining desired goals. One could question the efficacy or wisdom of questionnaires of the kind involved in these cases as a means of weeding out occasional misfits from the general run of Bar candidates, or criticize as unduly complicated or pervasive some aspects of such questionnaires. And one may also be understanding of the considerations which in this day and age breed lawsuits like these. But we should nonetheless take care lest the indulging of such points of view lead us into warped constitutional decision.

In my opinion the course chosen by these States cannot be said to be forbidden by the Constitution. I do not consider that the "less drastic means" test which has been applied in some First Amendment cases, see *NAACP* v. *Alabama*, 377 U. S. 288, 307–308 (1964), and cases cited therein, suffices to justify this Court in assuming general oversight of state investigatory procedures relating to Bar admissions. Nor do I think that the questioning of candidates as to their beliefs in violent overthrow necessarily runs afoul of true First Amendment concerns. I do not dispute that the First Amendment, as reflected in the Fourteenth, prevents States from denying admission to candidates merely because of theoretical beliefs in the "right" of revolution, but I do maintain that there

is no constitutional barrier to denying admission to those who seek entry to the profession for the very purpose of doing away with the orderly processes of law, and that temperate inquiry into the character of their beliefs in this regard, which is all that is shown here, is a relevant and permissible course to that end. It seems to me little short of chimerical to suggest that the independence of the Bar is threatened unless this Court steps in and puts a constitutional end to such a practice. Cf. *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

While I hope that I am no less sensitive than others on the Court to First Amendment values, I must say that the pervasive supervision over state Bar admission procedures which is now asked of us would work a most extravagant expansion of the current "chilling effects" approach to First Amendment doctrine. Knowing something of the great importance which the New York Bar attaches to the independence of the individual lawyer, I have little doubt but that the candidates involved in *Wadmond* will promptly gain admission to the Bar if they straightforwardly answer the inquiries put to them without further ado. And I should be greatly surprised if the same were not true as to Mrs. Baird and Mr. Stolar in Arizona and Ohio. But if I am mistaken and it should develop that any of these candidates are excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene.

Syllabus

YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2. Argued April 1, 1969—Reargued April 29 and November 16, 1970—Decided February 23, 1971

Appellee Harris, who had been indicted for violating the California Criminal Syndicalism Act, sued in the Federal District Court to enjoin appellant, the county District Attorney, from prosecuting him, contending that the Act is unconstitutional on its face and inhibits him in exercising his free-speech rights. Appellees Dan and Hirsch, claiming that the prosecution of Harris would "inhibit" them from peacefully advocating the program of the political party to which they belonged, and appellee Broslawsky, a college professor, claiming that the prosecution made him "uncertain" as to whether his teaching and reading practices would subject him to prosecution, intervened as plaintiffs. All asserted that they would suffer irreparable injury unless a federal injunction was issued. A three-judge court, relying on *Dombrowski* v. *Pfister*, 380 U. S. 479, held the Act void for vagueness and overbreadth, and enjoined Harris' prosecution. *Held:*

1. There is no basis for equitable jurisdiction based on the allegations of appellees other than Harris, who have not been indicted, arrested, or threatened with prosecution, and the normal course of a state criminal prosecution cannot be blocked on the basis of fears of prosecution that are merely speculative. Pp. 41–42.

2. Federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate in that (unlike the situation affecting Harris) there is a threat to the plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution. The decision in *Dombrowski, supra,* which involved alleged bad-faith harassment and is factually distinguishable from this case, does not substantially broaden the availability of injunctions against state criminal prosecutions. Pp. 43–54.

281 F. Supp. 507, reversed.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, in which HARLAN, J., joined, *post*, p. 54. BRENNAN, J., filed an opinion concurring in the result, in which WHITE and MARSHALL, JJ., joined, *post*, p. 56. DOUGLAS, J., filed a dissenting opinion, *post*, p. 58.

Clifford K. Thompson, Jr., Deputy Attorney General of California, argued the cause for appellant on the second reargument. *Albert W. Harris, Jr.*, Assistant Attorney General, argued the cause for appellant on the original argument and on the first reargument. With them on the briefs were *Thomas C. Lynch*, Attorney General, and *Evelle J. Younger, pro se.*

A. L. Wirin argued the cause for appellees on the reargruments. With him on the briefs were *Fred Okrand* and *Frank S. Pestana. Sam Rosenwein* argued the cause for appellees on the original argument. With him on the brief was *Mr. Pestana.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellee, John Harris, Jr., was indicted in a California state court, charged with violation of the California Penal Code §§ 11400 and 11401, known as the California Criminal Syndicalism Act, set out below.[1] He then filed

[1] "§ 11400. *Definition*

" 'Criminal syndicalism' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

"§ 11401. *Offense; punishment*

"Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful

a complaint in the Federal District Court, asking that court to enjoin the appellant, Younger, the District Attorney of Los Angeles County, from prosecuting him, and alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments. Appellees Jim Dan and Diane Hirsch intervened as plaintiffs in the suit, claiming that the prosecution of Harris would inhibit them as members of the Progressive Labor Party from peacefully advocating the program of their party, which was to replace capitalism with socialism and to abolish the profit system of production in this country. Appellee Farrell Broslawsky, an instructor in history at Los Angeles Valley College, also intervened claiming that the prosecution of Harris made him uncertain as to whether he could

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method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork. All claimed that unless the United States court restrained the state prosecution of Harris each would suffer immediate and irreparable injury. A three-judge Federal District Court, convened pursuant to 28 U. S. C. § 2284, held that it had jurisdiction and power to restrain the District Attorney from prosecuting, held that the State's Criminal Syndicalism Act was void for vagueness and overbreadth in violation of the First and Fourteenth Amendments, and accordingly restrained the District Attorney from "further prosecution of the currently pending action against plaintiff Harris for alleged violation of the Act." 281 F. Supp. 507, 517 (1968).

The case is before us on appeal by the State's District Attorney Younger, pursuant to 28 U. S. C. § 1253. In his notice of appeal and his jurisdictional statement appellant presented two questions: (1) whether the decision of this Court in *Whitney* v. *California,* 274 U. S. 357, holding California's law constitutional in 1927 was binding on the District Court and (2) whether the State's law is constitutional on its face. In this Court the brief for the State of California, filed at our request, also argues that only Harris, who was indicted, has standing to challenge the State's law, and that issuance of the injunction was a violation of a longstanding judicial policy and of 28 U. S. C. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

See, *e. g., Atlantic Coast Line R. Co.* v. *Engineers,* 398 U. S. 281, 285–286 (1970). Without regard to the ques-

tions raised about *Whitney* v. *California, supra,* since overruled by *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969), or the constitutionality of the state law, we have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.[2] We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.

I

Appellee Harris has been indicted, and was actually being prosecuted by California for a violation of its Criminal Syndicalism Act at the time this suit was filed. He thus has an acute, live controversy with the State and its prosecutor. But none of the other parties plaintiff in the District Court, Dan, Hirsch, or Broslawsky, has such a controversy. None has been indicted, arrested, or even threatened by the prosecutor. About these three the three-judge court said:

> "Plaintiffs Dan and Hirsch allege that they are members of the Progressive Labor Party, which advocates change in industrial ownership and political change, and that they feel inhibited in advo-

[2] Appellees did not explicitly ask for a declaratory judgment in their complaint. They did, however, ask the District Court to grant "such other and further relief as to the Court may seem just and proper," and the District Court in fact granted a declaratory judgment. For the reasons stated in our opinion today in *Samuels* v. *Mackell, post,* p. 66, we hold that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.

> cating the program of their political party through peaceful, non-violent means, because of the presence of the Act 'on the books,' and because of the pending criminal prosecution against Harris. Plaintiff Broslawsky is a history instructor, and he alleges that he is uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works may subject him to prosecution for violation of the Act." 281 F. Supp., at 509.

Whatever right Harris, who is being prosecuted under the state syndicalism law may have, Dan, Hirsch, and Broslawsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases. See *Golden* v. *Zwickler,* 394 U. S. 103 (1969). Since Harris is actually being prosecuted under the challenged laws, however, we proceed with him as a proper party.

II

Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." 1 Stat. 335, c. 22, § 5. A comparison of the 1793 Act with 28 U. S. C. § 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of the old Act. During all this lapse of years from 1793 to 1970 the statutory exceptions to the 1793 congressional enactment have been only three: (1) "except as expressly authorized by Act of Congress"; (2) "where necessary in aid of its jurisdiction"; and (3) "to protect or effectuate its judgments." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. See *Ex parte Young*, 209 U. S. 123 (1908).[3]

The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable

[3] For an interesting discussion of the history of this congressional policy up to 1941, see *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941).

injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of

our Union of States, occupies a highly important place in our Nation's history and its future.

This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. In *Fenner* v. *Boykin*, 271 U. S. 240 (1926), suit had been brought in the Federal District Court seeking to enjoin state prosecutions under a recently enacted state law that allegedly interfered with the free flow of interstate commerce. The Court, in a unanimous opinion made clear that such a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances:

> "*Ex parte Young*, 209 U. S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Id.*, at 243–244.

These principles, made clear in the *Fenner* case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. See, *e. g.*, *Spielman Motor*

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Sales Co. v. *Dodge*, 295 U. S. 89 (1935); *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45 (1941); *Watson* v. *Buck*, 313 U. S. 387 (1941); *Williams* v. *Miller*, 317 U. S. 599 (1942); *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943).

In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." *Fenner, supra.* Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. See, *e. g., Ex parte Young, supra,* at 145–147. Thus, in the *Buck* case, *supra,* at 400, we stressed:

> "Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. 'No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.' *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U. S. 45, 49."

And similarly, in *Douglas, supra,* we made clear, after reaffirming this rule, that:

> "It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith . . . ." 319 U. S., at 164.

This is where the law stood when the Court decided *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), and held that an injunction against the enforcement of certain state criminal statutes could properly issue under the circumstances presented in that case.[4] In *Dombrowski,*

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[4] Neither the cases dealing with standing to raise claims of vagueness or overbreadth, *e. g., Thornhill* v. *Alabama,* 310 U. S. 88 (1940), nor the loyalty oath cases, *e. g., Baggett* v. *Bullitt,* 377 U. S. 360 (1964), changed the basic principles governing the propriety of injunctions against state criminal prosecutions. In the standing cases we allowed attacks on overly broad or vague statutes in the absence of any showing that the defendant's conduct could not be regulated by some properly drawn statute. But in each of these cases the statute was not merely vague or overly broad "on its face"; the statute was held to be vague or overly broad as construed and *applied* to a particular defendant in a particular case. If the statute had been too vague as written but sufficiently narrow as applied, prosecutions and convictions under it would ordinarily have been permissible. See *Dombrowski, supra,* at 491 n. 7.

In *Baggett* and similar cases we enjoined state officials from discharging employees who failed to take certain loyalty oaths. We held that the States were without power to exact the promises involved, with their vague and uncertain content concerning advocacy and political association, as a condition of employment. Apart from the fact that any plaintiff discharged for exercising his constitutional right to refuse to take the oath would have had no adequate remedy at law, the relief sought was of course the kind that raises no special problem—an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution.

unlike many of the earlier cases denying injunctions, the complaint made substantial allegations that:

> "the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana." 380 U. S., at 482.

The appellants in *Dombrowski* had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes. These circumstances, as viewed by the Court sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention. See, *e. g., Beal, supra,* at 50. Indeed, after quoting the Court's statement in *Douglas* concerning the very restricted circumstances under which an injunction could be justified, the Court in *Dombrowski* went on to say:

> "But the allegations in this complaint depict a situation in which defense of the State's criminal

> prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 380 U. S., at 485–486.

And the Court made clear that even under these circumstances the District Court issuing the injunction would have continuing power to lift it at any time and remit the plaintiffs to the state courts if circumstances warranted. 380 U. S., at 491, 492. Similarly, in *Cameron* v. *Johnson,* 390 U. S. 611 (1968), a divided Court denied an injunction after finding that the record did not establish the necessary bad faith and harassment; the dissenting Justices themselves stressed the very limited role to be allowed for federal injunctions against state criminal prosecutions and differed with the Court only on the question whether the particular facts of that case were sufficient to show that the prosecution was brought in bad faith.

It is against the background of these principles that we must judge the propriety of an injunction under the circumstances of the present case. Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely "that incidental to every criminal proceeding brought lawfully and in good faith," *Douglas, supra,* and therefore under the settled doctrine we have already described he is not entitled to equitable relief "even if such statutes are unconstitutional," *Buck, supra.*

The District Court, however, thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment. We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument. But, as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards. In addition, we do not regard the reasons adduced to support this position as sufficient to justify such a substantial departure from the established doctrines regarding the availability of injunctive relief. It is undoubtedly true, as the Court stated in *Dombrowski*, that "[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." 380 U. S., at 486. But this sort of "chilling effect," as the Court called it, should not by itself justify federal intervention. In the first place, the chilling effect cannot be satisfactorily eliminated by federal injunctive relief. In *Dombrowski* itself the Court stated that the injunction to be issued there could be lifted if the State obtained an "acceptable limiting construction" from the state courts. The Court then made clear that once this was done, prosecutions could then be brought for conduct occurring before the narrowing construction was made, and proper convictions could stand so long as the defendants were not deprived of fair warning. 380 U. S., at 491 n. 7. The kind of relief granted in *Dombrowski* thus does not effectively eliminate uncertainty as to the coverage of the state

statute and leaves most citizens with virtually the same doubts as before regarding the danger that their conduct might eventually be subjected to criminal sanctions. The chilling effect can, of course, be eliminated by an injunction that would prohibit any prosecution whatever for conduct occurring prior to a satisfactory rewriting of the statute. But the States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings. Thus, in *Dombrowski* itself the Court carefully reaffirmed the principle that even in the direct prosecution in the State's own courts, a valid narrowing construction can be applied to conduct occurring prior to the date when the narrowing construction was made, in the absence of fair warning problems.

Moreover, the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967). Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the im-

portant and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.

Beyond all this is another, more basic consideration. Procedures for testing the constitutionality of a statute "on its face" in the manner apparently contemplated by *Dombrowski*, and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation [5] it has been clear that, even when suits of this kind involve a "case or controversy" sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judi-

[5] See 1 The Records of the Federal Convention of 1787, p. 21 (Farrand ed. 1911).

ciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, see, *e. g., Landry* v. *Daley,* 280 F. Supp. 938 (ND Ill. 1968), rev'd *sub nom. Boyle* v. *Landry, post,* p. 77, ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

For these reasons, fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution, we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment rights. There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the *Buck* case, *supra,* we indicated:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against

whomever an effort might be made to apply it." 313 U. S., at 402.

Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U. S. C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.

The judgment of the District Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, concurring.*

The questions the Court decides today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals only

*[This opinion applies also to No. 7, *Samuels et al.* v. *Mackell et al.*, and No. 9, *Fernandez* v. *Mackell et al.*, *post*, p. 66; No. 41, *Dyson et al.* v. *Stein*, *post*, p. 200; and No. 83, *Byrne et al.* v. *Karalexis et al.*, *post*, p. 216.]

with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court.

In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U. S. C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by § 1 of the Civil Rights Act of 1871, now 42 U. S. C. § 1983.[1] And since all these cases involve state criminal prosecutions, we do not deal with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently.[2] Finally, the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions.

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[1] See also *Cameron* v. *Johnson*, 390 U. S. 611, 613–614, n. 3; *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2.

[2] Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. See *ante*, at 43–44; *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163–164. The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.

Cf. *Law Students Civil Rights Research Council* v. *Wadmond*, *post*, p. 154; *Wisconsin* v. *Constantineau*, 400 U. S. 433; *Rosado* v. *Wyman*, 397 U. S. 397.

These considerations would not, to be sure, support any distinction between civil and criminal proceedings should the ban of 28 U. S. C. § 2283, which makes no such distinction, be held unaffected by 42 U. S. C. § 1983.

The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.[3] Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, *ante*, at 53–54; cf. *Evers* v. *Dwyer*, 358 U. S. 202, or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement, *ante*, at 47–49. In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights. Cf. *Georgia* v. *Rachel*, 384 U. S. 780.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the result.

I agree that the judgment of the District Court should be reversed. Appellee Harris had been indicted for violations of the California Criminal Syndicalism Act before he sued in federal court. He has not alleged that the prosecution was brought in bad faith to harass him. His constitutional contentions may be adequately adjudi-

[3] The negative pregnant in this sentence—that a federal court may, as a matter of policy, intervene when such "exceptional and extremely limited circumstances" are found—is subject to any further limitations that may be placed on such intervention by 28 U. S. C. § 2283.

cated in the state criminal proceeding, and federal intervention at his instance was therefore improper.*

Appellees Hirsch and Dan have alleged that they "feel inhibited" by the statute and the prosecution of Harris from advocating the program of the Progressive Labor Party. Appellee Broslawsky has alleged that he "is uncertain" whether as an instructor in college history he can under the statute give instruction relating to the Communist Manifesto and similar revolutionary works. None of these appellees has stated any ground for a reasonable expectation that he will actually be prosecuted under the statute for taking the actions contemplated. The court below expressly declined to rely on any finding "that . . . Dan, Hirsch or Broslawsky stand[s] in any danger of prosecution by the [State], because of the activities that they ascribed to themselves in the com-

*The District Court erroneously interpreted *Zwickler* v. *Koota*, 389 U. S. 241 (1967), as authorizing federal court consideration of a constitutional claim at issue in a pending state proceeding, whether or not the federal court plaintiff had presented his claim to the state court. It suffices here to note that in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court. The court below also thought it significant that appellee Harris had raised his constitutional claim in the state courts in a motion to dismiss the indictment and in petitions in the state appellate courts for a writ of prohibition. It was questioned at oral argument whether constitutional issues could properly be raised by the procedures invoked by Harris, and it was suggested that the denial of Harris' motions did not necessarily involve rejection of his constitutional claims. However, even if the California courts had at that interlocutory stage rejected Harris' constitutional arguments, that rejection would not have provided a justification for intervening by the District Court. Harris could have sought direct review of that rejection of his constitutional claims or he could have renewed the claims in requests for instructions, and on direct review of any conviction in the state courts and in this Court. These were the proper modes for presentation and these the proper forums for consideration of the constitutional issues.

plaint . . . ." 281 F. Supp. 507, 516. It is true, as the court below pointed out, that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law," *Baggett* v. *Bullitt*, 377 U. S. 360, 373 (1964), but still there must be a live controversy under Art. III. No threats of prosecution of these appellees are alleged. Although Dan and Hirsch have alleged that they desire to advocate doctrines of the Progressive Labor Party, they have not asserted that their advocacy will be of the same genre as that which brought on the prosecution of Harris. In short, there is no reason to think that California has any ripe controversy with them. See *Golden* v. *Zwickler*, 394 U. S. 103 (1969); *Perez* v. *Ledesma*, *post*, p. 93 (BRENNAN, J., concurring and dissenting).

MR. JUSTICE DOUGLAS, dissenting.*

The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dombrowski* v. *Pfister*, 380 U. S. 479. There we recognized that in times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.

Dombrowski represents an exception to the general rule that federal courts should not interfere with state criminal prosecutions. The exception does not arise merely because prosecutions are threatened to which the First Amendment will be the proffered defense. *Dombrowski* governs statutes which are a blunderbuss by

*[This opinion also applies to No. 4, *Boyle, Judge, et al.* v. *Landry et al.*, *post*, p. 77.]

themselves or when used *en masse*—those that have an "overbroad" sweep. "If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Id.*, at 487. It was in the context of overbroad state statutes that we spoke of the "chilling effect upon the exercise of First Amendment rights" caused by state prosecutions. *Ibid.*

As respects overbroad statutes we said at least as early as 1940 that when dealing with First Amendment rights we would insist on statutes "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307.

The special circumstances when federal intervention in a state criminal proceeding is permissible are not restricted to bad faith on the part of state officials or the threat of multiple prosecutions. They also exist where for any reason the state statute being enforced is unconstitutional on its face. As Mr. Justice Butler, writing for the Court, said in *Terrace* v. *Thompson*, 263 U. S. 197, 214:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity."

Our *Dombrowski* decision was only another facet of the same problem.

In *Younger*, "criminal syndicalism" is defined so broadly as to jeopardize "teaching" that socialism is preferable to free enterprise.

Harris' "crime" was distributing leaflets advocating change in industrial ownership through political action. The statute under which he was indicted was the one involved in *Whitney* v. *California*, 274 U. S. 357, a decision we overruled in *Brandenburg* v. *Ohio*, 395 U. S. 444, 449.[1]

If the "advocacy" which Harris used was an attempt at persuasion through the use of bullets, bombs, and arson, we would have a different case. But Harris is charged only with distributing leaflets advocating political action toward his objective. He tried unsuccessfully to have the state court dismiss the indictment on constitutional grounds. He resorted to the state appellate court for writs of prohibition to prevent the trial, but to no avail. He went to the federal court as a matter of last resort in an effort to keep this unconstitutional trial from being saddled on him.

The "anti-injunction" statute, 28 U. S. C. § 2283,[2] is not a bar to a federal injunction under these circumstances. That statute was adopted in 1793, § 5, 1 Stat. 335,[3] and reflected the early view of the proper role of the federal courts within American federalism.

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[1] See Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg* Concerto, 22 Stan. L. Rev. 1163 (1970).

[2] "A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis added.)

[3] In its initial form the "anti-injunction" Act provided: "[N]or shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state." There were no exceptions. In 1874 it was subsequently modified by an insertion of the

Whatever the balance of the pressures of localism and nationalism prior to the Civil War, they were fundamentally altered by the war. The Civil War Amendments made civil rights a national concern. Those Amendments, especially § 5 of the Fourteenth Amendment, cemented the change in American federalism brought on by the war. Congress immediately commenced to use its new powers to pass legislation. Just as the first Judiciary Act, 1 Stat. 73, and the "anti-injunction" statute represented the early views of American federalism, the Reconstruction statutes, including the enlargement of federal jurisdiction,[4] represent a later view of American federalism.

One of the jurisdiction-enlarging statutes passed during Reconstruction was the Act of April 20, 1871. 17

Revisers to read: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. § 720.

In *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 133–134, in discussing the statutory exceptions to the "anti-injunction" Act we noted that, while only bankruptcy was the explicit exception, there were others. (1) The "Removal Acts qualify *pro tanto* the Act of 1793." (2) The Act of 1851 limiting shipowners' liability "[b]eing a 'subsequent statute' to the Act of 1793 . . . operates as an implied legislative amendment to it." We also added (3) the Interpleader Act of 1926 and (4) the Frazier-Lemke Act, 47 Stat. 1473. *Toucey* limited a line of cases dealing with nonstatutory exceptions to the "anti-injunction" Act. Shortly thereafter the current language of § 2283 was written into the Judicial Code. The Reviser's Note states: "[T]he revised section restores the basic law as generally understood and interpreted prior to the Toucey decision." Both pre-*Toucey* and post-*Toucey* decisions recognize implied legislative exceptions to the "anti-injunction" Act. See *Porter* v. *Dicken*, 328 U. S. 252; *Leiter Minerals* v. *United States*, 352 U. S. 220.

[4] What is now 28 U. S. C. § 1343 (3) was added in 1871, 17 Stat. 13, and the federal-question jurisdiction of 28 U. S. C. § 1331 was added in 1875. 18 Stat. 470.

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Stat. 13. Beyond its jurisdictional provision that statute, now codified as 42 U. S. C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution* and laws, shall be liable to the party injured in an action at law, *suit in equity,* or other proper proceeding for redress." (Emphasis added.)

A state law enforcement officer is someone acting under "color of law" even though he may be misusing his authority. *Monroe* v. *Pape,* 365 U. S. 167. And prosecution under a patently unconstitutional statute is a "deprivation of . . . rights, privileges, or immunities secured by the Constitution." "Suit[s] in equity" obviously includes injunctions.[5]

I hold to the view that § 1983 is included in the "expressly authorized" exception to § 2283,[6] a point not raised or considered in the much-discussed *Douglas* v. *City of Jeannette,* 319 U. S. 157. There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.

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[5] We have already held that § 1983 requires no exhaustion of state remedies. *McNeese* v. *Board of Education,* 373 U. S. 668.

[6] In accord with the view are *Honey* v. *Goodman,* 432 F. 2d 333 (CA6), and *Cooper* v. *Hutchinson,* 184 F. 2d 119 (CA3). Opposed are *Goss* v. *Illinois,* 312 F. 2d 257 (CA7), and *Baines* v. *City of Danville,* 337 F. 2d 579 (CA4).

And see Maraist, Federal Injunctive Relief Against State Court Proceedings: The Significance of *Dombrowski,* 48 Tex. L. Rev. 535, 591 *et seq.* (1970).

That was the view of Judge Will in the *Boyle* case, *Landry* v. *Daley*, 288 F. Supp. 200, 223. In speaking of the Civil War Amendments as "a constitutional revolution in the nature of American federalism" he said:

> "This revolution, in turn, represents a historical judgment. It emphasizes the overwhelming concern of the Reconstruction Congresses for the protection of the newly won rights of freedmen. By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens." *Ibid.*

In *Boyle* the statute makes "intimidation" to "commit any criminal offense" an offense. The three-judge court said:

> "It . . . makes criminal threats such as the following: (1) threats by dissentient groups to engage in disorderly conduct, threats by residents of a high-crime neighborhood to carry concealed weapons for their own protection, and threats by mothers to block a dangerous state highway to demonstrate the need for increased safety measures. Indeed, the phrase 'commit any criminal offense' is so broad as to include threats to commit misdemeanors punishable by fine only. These evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion a wide berth." *Landry* v. *Daley*, 280 F. Supp. 938, 964.

Landry and others brought a class action challenging the constitutional validity of five sections of the Illinois statutes. They alleged arrests under all but two of the challenged sections. Just before trial they abandoned their challenge of two of the five sections. The District Court held one of the remaining sections constitutional and the "mob action" and "intimidation" sections unconstitutional. Appellants have not appealed the determination that the "mob action" section of the Illinois statutes is unconstitutional.

The Court dismisses this case because there is no showing of irreparable injury on what it describes as "flimsy allegations." *Post*, at 81. The Court states: "There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner." *Ibid.* Landry and his associates, however, allege that appellants are using the intimidation section along with several other sections to harass them, not to prosecute them in the normal manner. They allege that appellants are arresting them without warrants or probable cause, and detaining them on excessive bail. They allege that the arrests are made during peaceful demonstrations and without any expectation of securing valid convictions. In sum, Landry and his group allege that the "intimidation" section is one of several statutes which appellants are using *en masse* as part of a plan to harass them and discourage their exercise of their First Amendment rights. There is thus a lively and existing case or controversy concerning First Amendment rights. And I believe that the federal court acted in our finest tradition when it issued the stay.

As the standards of certainty in statutes containing criminal sanctions are higher than those in statutes containing civil sanctions, so are the standards of certainty touching on freedom of expression higher than those in other areas. *Winters* v. *New York*, 333 U. S. 507, 515–516. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt."

Where freedom of expression is at stake these requirements must be more sedulously enforced.

In *Younger* there is a prosecution under an unconstitutional statute and relief is denied. In *Boyle* there is harassment but as yet no prosecution. Allegations of a prosecution or harassment under facially unconstitutional statutes should be sufficient for the exercise of federal equity powers.

Dombrowski and 42 U. S. C. § 1983 indicate why in *Boyle* federal intervention against enforcement of the state laws is appropriate. The case of *Younger* is even stronger. There the state statute challenged is the prototype of the one we held unconstitutional in *Brandenburg* v. *Ohio, supra.*

The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these appellees should be made to walk the treacherous ground of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss, and debate the troubles of these days. When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is in danger.

SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 7. Argued April 1, 1969—Reargued April 29 and November 16, 1970—Decided February 23, 1971*

Appellants, who had been indicted under New York's criminal anarchy law, sought declaratory as well as injunctive relief against their prosecutions, on the ground that the law is unconstitutional. A three-judge District Court upheld the law and dismissed the complaints. *Held:*

1. Since there was no showing that appellants have suffered or will suffer great and immediate irreparable injury by virtue of their being prosecuted in the state courts, where they can make their constitutional contentions, there is no basis for federal injunctive relief. *Younger* v. *Harris, ante,* p. 37. Pp. 68–69.

2. The same principles that govern the propriety of federal injunctions of state criminal proceedings govern the issuance of federal declaratory judgments in connection with such proceedings, and appellants here should have been denied declaratory relief without consideration of the merits of their constitutional claims. Pp. 69–74.

288 F. Supp. 348, affirmed.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post,* p. 74. STEWART, J., filed a concurring opinion, in which HARLAN, J., joined, *ante,* p. 54. BRENNAN, J., filed an opinion concurring in the result, in which WHITE and MARSHALL, JJ., joined, *post,* p. 75.

Victor Rabinowitz argued the cause for appellants in No. 7 on the original argument and on the reargument. With him on the briefs were *Leonard B. Boudin, Michael Standard,* and *Dorian Bowman. Eleanor Jackson Piel*

*Together with No. 9, *Fernandez* v. *Mackell, District Attorney of Queens County, et al.,* also on appeal from the same court.

argued the cause and filed briefs for appellant in No. 9 on the original argument and on the rearguments.

Frederick J. Ludwig argued the cause for appellee Mackell in both cases on the original argument and on the rearguments. With him on the briefs was *Thomas J. Mackell, pro se.* *Maria L. Marcus,* Assistant Attorney General, argued the cause for appellee Attorney General of New York in both cases on the original argument and on the rearguments. With her on the briefs were *Louis J. Lefkowitz,* Attorney General, *pro se,* *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Hillel Hoffman,* Assistant Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellants in these two cases were all indicted in a New York state court on charges of criminal anarchy, in violation of §§ 160, 161, 163, and 580 (1) of the New York Penal Law.[1] They later filed these actions in federal district court,[2] alleging (1) that the anarchy statute was void for vagueness in violation of due process, and an abridgment of free speech, press, and assembly, in violation of the First and Fourteenth Amendments; (2) that the anarchy statute had been pre-empted by federal law; and (3) that the New York laws under which the grand jury had been drawn violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment because they disqualified from jury service any member of the community who did not own real or personal property of the value of at least $250, and be-

[1] These provisions were repealed effective September 1, 1967, and a new criminal anarchy statute, in somewhat different form, took effect on the same date.

[2] The complaint in No. 7 was filed in the Southern District of New York. The complaint in No. 9 was originally filed in the Eastern District, but was later transferred to the Southern District by consent.

cause the laws furnished no definite standards for determining how jurors were to be selected. Appellants charged that trial of these indictments in state courts would harass them, and cause them to suffer irreparable damages, and they therefore prayed that the state courts should be enjoined from further proceedings. In the alternative, appellants asked the District Court to enter a declaratory judgment to the effect that the challenged state laws were unconstitutional and void on the same grounds. The three-judge court, convened pursuant to 28 U. S. C. § 2284, held that the New York criminal anarchy law was constitutional as it had been construed by the New York courts and held that the complaints should therefore be dismissed. 288 F. Supp. 348 (SDNY 1968).[3]

In No. 2, *Younger* v. *Harris, ante,* p. 37, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable injury in accord with the rule set out in *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable injury, our decision in the *Younger* case is dispositive of the prayers for injunctions

[3] The court also said that even if its view on the merits was wrong, relief should be withheld because the statutes being challenged were no longer in effect. With respect to the plaintiffs' challenge to the selection of the grand jury, the District Court held, in reliance on *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943), that this claim could be effectively presented to the New York courts and therefore did not call for federal intervention at this stage.

here. The plaintiffs in the present cases also included in their complaints an alternative prayer for a declaratory judgment, but for the reasons indicated below, we hold that this alternative prayer does not require a different result, and that under the circumstances of these cases, the plaintiffs were not entitled to federal relief, declaratory or injunctive. Accordingly we affirm the judgment of the District Court, although not for the reasons given in that court's opinion.

In our opinion in the *Younger* case, we set out in detail the historical and practical basis for the settled doctrine of equity that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury. The question presented here is whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate. The question is not, however, a novel one. It was presented and fully considered by this Court in *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943). We find the reasoning of this Court in the *Great Lakes* case fully persuasive and think that its holding is controlling here.

In the *Great Lakes* case several employers had brought suit against a Louisiana state official, seeking a declaratory judgment that the State's unemployment compensation law, which required the employers to make contributions to a state compensation fund, was unconstitutional. The lower courts had dismissed the complaint on the ground that the challenged law was constitutional. This Court affirmed the dismissal, "but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration

of the merits." *Id.*, at 301–302. The Court, in a unanimous opinion written by Mr. Chief Justice Stone, noted first that under long-settled principles of equity, the federal courts could not have enjoined the Louisiana official from collecting the state tax at issue there unless, as was not true in that case, there was no adequate remedy available in the courts of the State. This judicial doctrine had been approved by Congress in the then-recent Tax Injunction Act of 1937, 50 Stat. 738, now 28 U. S. C. § 1341. Although the declaratory judgment sought by the plaintiffs was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory judgment was nevertheless "essentially an equitable cause of action," and was "analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title." 319 U. S., at 300. In addition, the legislative history of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, as amended, 28 U. S. C. § 2201, showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles. Accordingly, the Court held that in an action for a declaratory judgment, "the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." 319 U. S., at 300. The Court's application of these principles to the specific problem of declaratory judgments relating to the collection of state taxes is worth quoting in full, because it bears so directly on the problem before us in the present case:

> "The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress,

have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

"It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy, or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." 319 U. S., at 299.

The continuing validity of the Court's holding in the *Great Lakes* case has been repeatedly recognized and reaffirmed by this Court. See, *e. g.*, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 545 n. 4 (1946); *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, 175 (1949); *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 253 (1952) (DOUGLAS, J., dissenting); *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 189 (1959); *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, 8 (1962). Although we have found no case in this Court dealing with the application of this doctrine to cases in which the relief sought affects state criminal prosecutions rather than

state tax collections, we can perceive no relevant difference between the two situations with respect to the limited question whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "[f]urther necessary or proper relief," 28 U. S. C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 U. S. C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would. As we said in the *Wycoff* case, 344 U. S., at 247:

> "Is the declaration contemplated here to be *res judicata,* so that the [state court] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State [court] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights."

See also *H. J. Heinz Co.* v. *Owens*, 189 F. 2d 505, 508–509 (CA9 1951). We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

We do not mean to suggest that a declaratory judgment should never be issued in cases of this type if it has been concluded that injunctive relief would be improper. There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief. Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction.

For the reasons we have stated, we hold that the court below erred in proceeding to a consideration of the merits of the New York criminal anarchy law. Here, as in the *Great Lakes* case, the judgment dismissing the complaint was based on an adjudication that the statutes challenged here are constitutional and is thus in effect a declaratory judgment. We affirm the judgment dismissing the complaint, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits. We, of course, ex-

press no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun.

Affirmed.

[For concurring opinion of MR. JUSTICE STEWART, see *ante*, p. 54.]

MR. JUSTICE DOUGLAS, concurring.

The same New York statutes on anarchy that were sustained in *Gitlow* v. *New York*, 268 U. S. 652, are involved in these cases. It was in that case that Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, said in dissent:

> "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

In *Gitlow* the only overt acts were advocacy of overthrow and publication of the writings that contained the advocacy. *Id.*, at 655. *Gitlow* and its progeny, including *Whitney* v. *California*, 274 U. S. 357, went into the discard with our decision in *Brandenburg* v. *Ohio*,

395 U. S. 444. In that case the indictment charged advocating terrorism "by word of mouth" as a method of political reform and assembly for the purpose of such advocacy. We held that neither advocacy nor assembly in order to advocate political action may be made punishable.

Brandenburg, however, is of no help to these appellants. For while some of the counts embrace only advocacy or acts which fall within its penumbra, still others are in the field of activities far removed from the protection of the First Amendment. There is a question concerning some of the overt acts—whether, as I asked in my dissent in *Epton* v. *New York*, 390 U. S. 29, 30, a constitutionally protected right such as speech or assembly may be used as an overt act in furtherance of a conspiracy. But other overt acts relate to the acquisition of weapons, gunpowder, and the like, and the storing of gasoline to start fires. Persuasion by such means plainly has no First Amendment protection.

It therefore cannot be said that the cases against Samuels and Fernandez are palpably unconstitutional. It is for the state courts by sifting out the chaff from the charges through motions to strike, instructions to the jury, and other procedural devices to preserve such First Amendment rights as may be involved here. Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before

their suit in federal court was filed. They have not alleged facts amounting to bad-faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez* v. *Ledesma, post,* p. 93 (separate opinion of BRENNAN, J.).

Syllabus

BOYLE, JUDGE, ET AL. *v.* LANDRY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 4. Argued March 24, 1969—Reargued April 29 and November 16, 1970—Decided February 23, 1971

Appellees brought this action for injunctive and declaratory relief against enforcement of various Illinois statutes under some of which certain appellees had been arrested and all of which they claimed were being used to intimidate them in the exercise of their First Amendment rights. A three-judge District Court declared invalid for overbreadth and enjoined enforcement of a statutory provision (under which no appellee had been arrested or charged) that prohibited intimidating a person by threats to "[c]ommit any criminal offense." *Held:* Since no appellee suffered, or was threatened with, great and immediate irreparable injury and the future application of the statute to any appellee was merely speculative, the District Court was not warranted in interfering with state law enforcement by the issuance of an injunction or declaratory judgment. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell, ante,* p. 66. Pp. 80–81.

280 F. Supp. 938, reversed and remanded.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. BRENNAN, WHITE, and MARSHALL, JJ., concurred in the result. DOUGLAS, J., filed a dissenting opinion, *ante,* p. 58.

Thomas E. Brannigan argued the cause for appellants on the second reargument. *Dean H. Bilton* argued the cause for appellants on the first reargument. *Ronald Butler* argued the cause for appellants on the original argument. With *Messrs. Butler* and *Bilton* on the brief were *Daniel P. Coman* and *Daniel W. Weil.*

Ellis E. Reid argued the cause for appellees on the original argument and on the reargruments. With him on the brief were *Robert L. Tucker* and *Stanley A. Bass.*

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MR. JUSTICE BLACK delivered the opinion of the Court.

This action was brought in federal court by seven groups of Negro residents of Chicago, Illinois, seeking a declaratory judgment and an injunction against the enforcement of a number of Illinois statutes and Chicago ordinances on the grounds that they violated various provisions of the Federal Constitution. The complaint named as defendants and sought relief against a number of officials of Cook County and the City of Chicago: the Mayor, the Chief Judge, and two Magistrates of the Circuit Court, the State's Attorney for the county, the Sheriff, the Superintendent of Police, the city's Corporation Counsel and his assistant, and three city police officers. Their complaint challenged as invalid the Illinois statutes prohibiting mob action,[1] resisting arrest,[2] aggravated assault,[3] aggravated battery,[4] and intimidation.[5] They alleged that some of the plaintiffs had been arrested under some of these statutes and that those prosecutions were currently pending in Illinois state courts, and that Negroes were being intimidated in the exercise of their First Amendment rights (1) through the wholesale use of all the statutes alleged to be unconstitutional to prosecute members of the Negro community and (2) through the use of arrests without probable cause, coupled with the setting of exorbitant bail. The complaint contended that the defendants had threatened to enforce all of the named statutes for the sole purpose of harassing and intimidating the plaintiffs. They requested the convening of a three-judge federal court under 28 U. S. C. §§ 2281 and 2284, a declaration that the challenged statutes were unconstitutional, and

[1] Ill. Rev. Stat., c. 38, § 25–1 (1967).
[2] Ill. Rev. Stat., c. 38, § 31–1.
[3] Ill. Rev. Stat., c. 38, § 12–2.
[4] Ill. Rev. Stat., c. 38, § 12–4.
[5] Ill. Rev. Stat., c. 38, § 12–6.

temporary and permanent injunctions prohibiting the pending and any possible future prosecutions under the statutes in question.

The defendants answered by opposing the convening of a three-judge court and the issuance of a temporary injunction, and moved to dismiss the complaint on the grounds, among others, that (1) as to those plaintiffs against whom prosecutions were then pending, there was an adequate remedy at law in that they would be able to present their constitutional challenges to the statutes involved in the pending criminal proceedings, and that as to such plaintiffs the court was barred by 28 U. S. C. § 2283 from issuing an injunction against state court proceedings,[6] and that (2) as to those plaintiffs without matters pending in the state courts, there were no facts alleged in the complaint showing that any of those plaintiffs were threatened with prosecution under any of the challenged statutes, or that they would suffer any irreparable injury if they were required to defend any prosecution that might be brought against them in state court.

The single Federal District Judge denied the defendants' motion to dismiss and convened the three-judge court.[7] The three-judge court upheld all of the challenged statutes except for one subsection of the mob-action statute which prohibited "[t]he assembly of 2 or

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[6] 28 U. S. C. § 2283 provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[7] The District Judge found that the challenges to various city ordinances were not appropriate for determination by a three-judge court and these claims were not certified to the three-judge court. In addition, the plaintiffs abandoned their challenge to the constitutionality of the Illinois aggravated assault and aggravated battery statutes.

more persons to do an unlawful act . . . ," [8] and one subsection of the intimidation statute which prohibited intimidating a person by threats to "[c]ommit any criminal offense. . . ." [9] These last two subsections were declared invalid on the grounds that they were overly broad and might sweep within their scope conduct that could not constitutionally be made criminal. The court decreed that the defendants—city and county officials—"be and they are hereby perpetually enjoined and restrained from the enforcement of or the prosecution under" the two statutory subsections it declared unconstitutional. The defendant officials did not appeal the three-judge court's declaration and injunction invalidating the challenged subsection of the mob-action statute and that holding is therefore not before us. We have before us only the court's declaration of the unconstitutionality and injunction against the enforcement of one subsection of the intimidation statute.

It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which

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[8] Ill. Rev. Stat., c. 38, § 25–1, provides that:

"(a) Mob action consists of any of the following:

. . . . . .

"(2) The assembly of 2 or more persons to do an unlawful act . . . ."

[9] Ill. Rev. Stat., c. 38, § 12–6, provides that:

"(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

. . . . . .

"(3) Commit any criminal offense . . . ."

the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. Rather, it appears from the allegations that those who originally brought this suit made a search of state statutes and city ordinances with a view to picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them. There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner. As our holdings today in *Younger* v. *Harris, ante,* p. 37, and *Samuels* v. *Mackell, ante,* p. 66, show, the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here.

For the reasons set out above and for those set out at greater length today in *Younger* and *Samuels,* we reverse.

Reversed and remanded.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur in the result.

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante,* p. 58.]

PEREZ ET AL. *v.* LEDESMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 60. Argued November 17, 1970—Decided February 23, 1971

Appellees, who had been arrested and charged with violating a Louisiana statute and a parish ordinance by displaying for sale allegedly obscene material (which was seized by the arresting officers), brought this suit in the Federal District Court for a declaration that the statute and ordinance were unconstitutional and for an injunction against their enforcement. A three-judge court which was convened upheld the statute and declined to issue an injunction, but, finding that the arrests and seizure were invalid, entered a suppression order prohibiting the use in state criminal proceedings of the illegally seized material and requiring its return to appellees. The three-judge court recognized that it had no jurisdiction to pass on the constitutionality of the ordinance but expressed the view that the ordinance was invalid. The single-judge court then declared the ordinance unconstitutional. Appellants appealed directly to this Court from the suppression order and the declaratory judgment invalidating the ordinance. *Held:*

1. The three-judge court erred in issuing the suppression order and thereby stifling the then-pending good-faith state criminal proceeding during which the defense should first raise its constitutional claims. *Younger* v. *Harris, ante,* p. 37. Pp. 84–85.

2. This Court has no jurisdiction to review on direct appeal the validity of the order declaring the ordinance invalid, since it was a decision of a single federal judge and as such was appealable only to the Court of Appeals. Pp. 86–88.

304 F. Supp. 662, reversed in part, and vacated and remanded in part.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post,* p. 89. DOUGLAS, J., filed an opinion dissenting in part, *post,* p. 90. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which WHITE and MARSHALL, JJ., joined, *post,* p. 93.

Charles H. Livaudais argued the cause for appellants. With him on the brief was *Robert J. Klees.*

Jack Peebles argued the cause for appellees. With him on the brief were *Stanley Fleishman* and *Robert Eugene Smith.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Given our decisions today in No. 2, *Younger* v. *Harris, ante,* p. 37; No. 7, *Samuels* v. *Mackell,* and No. 9, *Fernandez* v. *Mackell, ante,* p. 66; No. 4, *Boyle* v. *Landry, ante,* p. 77; No. 83, *Byrne* v. *Karalexis, post,* p. 216; and No. 41, *Dyson* v. *Stein, post,* p. 200, in which we have determined when it is appropriate for a federal court to intervene in the administration of a State's criminal laws, the disposition of this case should not be difficult.

I

Ledesma and the other appellees operated a newsstand in the Parish of St. Bernard, Louisiana, where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, La. Rev. Stat. Ann. § 14:106 (Supp. 1970), and St. Bernard Parish Ordinance 21–60. After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That court held the Louisiana statute constitutional on its face, but ruled that the arrests of appellees and the seizure of the allegedly obscene materials were invalid for lack of a prior adversary hearing on the character of the seized materials. Although the three-judge court declined to issue an injunction against the pending

or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. 304 F. Supp. 662, 667–670 (1969). The local district attorney and other law enforcement officers appealed and we set the case for argument but postponed the question of jurisdiction to the hearing on the merits. 399 U. S. 924 (1970).[1]

It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings. Even the three-judge court recognized that its judgment would effectively stifle the then-pending state criminal prosecution.

> "In view of our holding that the arrests and seizures in these cases are invalid for want of a prior adversary judicial determination of obscenity, which holding requires suppression and return of the seized materials, *the prosecutions should be effectively terminated.*" 304 F. Supp., at 670. (Emphasis added.)

Moreover, the District Court retained jurisdiction "for the purposes of hereafter entering any orders necessary to enforce" its view of the proper procedures in the then-pending state obscenity prosecution. According to our holding in *Younger* v. *Harris, supra,* such federal interference with a state prosecution is improper. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see *Stefanelli* v. *Minard,* 342

[1] Under 28 U. S. C. § 1253 an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." The orders directing the suppression of evidence and the return of the seized material were injunctive orders against the appellants. Thus, we have jurisdiction to review those orders.

U. S. 117 (1951), subject, of course, to review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus. Here Ledesma was free to present his federal constitutional claims concerning arrest and seizure of materials or other matters to the Louisiana courts in the manner permitted in that State. Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate. See *Younger* v. *Harris, supra; Ex parte Young,* 209 U. S. 123 (1908). There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws. We therefore hold that the three-judge court improperly intruded into the State's own criminal process and reverse its orders suppressing evidence in the pending state prosecution and directing the return of all seized materials.

II

After crippling Louisiana's ability to enforce its criminal statute against Ledesma, the three-judge court expressed the view that the Parish of St. Bernard Ordinance 21–60 was invalid. Although the court below recognized that "it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance," the court nevertheless seized the "opportunity to express its views on the constitutionality of the ordinance." 304 F. Supp. 662, 670 n. 31 (1969). Judge Boyle, the District Judge who initially referred the action to the three-judge court, adopted that court's view and declared the parish ordinance invalid. There is considerable question concern-

ing the propriety of issuing a declaratory judgment against a criminal law in the circumstances of this case.[2]

III

We are, however, unable to review the decision concerning the local ordinance because this Court has no jurisdiction to review on direct appeal the validity of a declaratory judgment against a local ordinance, such as St. Bernard Parish Ordinance 21–60. Even if an order granting a declaratory judgment against the ordinance had been entered by the three-judge court below (which it had not), that court would have been acting in the capacity of a single-judge court. We held in *Moody* v. *Flowers*, 387 U. S. 97 (1967), that a three-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U. S. C. § 1253 we have jurisdiction to consider on direct appeal only those civil actions "required . . . to be heard and determined" by a three-judge court. Since the constitutionality of this parish ordinance was not "required . . . to be heard and determined" by a three-judge panel, there is no jurisdiction in this Court to review that question.

The fact that a three-judge court was properly convened in this case to consider the injunctive relief requested against the enforcement of the state statute, does not give this Court jurisdiction on direct appeal over other controversies where there is no independent juris-

[2] At the time the instant federal court suit was filed, there was pending in Louisiana state court a criminal prosecution under the parish ordinance. In *Samuels* v. *Mackell*, *supra*, we held that interference with pending state criminal prosecutions by declaratory judgments is subject to the same restrictions curbing federal interference by injunction. *Id.*, at 73. As indicated above, there are no facts present in this record to show that appellees would suffer irreparable injury of the kind necessary to justify federal injunctive interference with the state criminal processes.

dictional base. Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them.[3] See *Public Service Comm'n* v. *Brashear Freight Lines*, 306 U. S. 204 (1939).

In this case, the order granting the declaratory judgment was not issued by a three-judge court, but rather by Judge Boyle, acting as a single district judge. The three-judge court stated:

> "The view expressed by this court concerning the constitutionality of the ordinance is shared by the initiating federal district judge *and is adopted by reference in his opinion issued contemporaneously herewith.*" 304 F. Supp., at 670 n. 31. (Emphasis added.)

The last clause of the quoted sentence indicates what, under *Moody* v. *Flowers*, must be the case: The decision granting declaratory relief against the Parish of St. Bernard Ordinance 21–60 was the decision of a single federal judge. This fact is confirmed by the orders entered by the two courts. The three-judge court entered the following order at the end of its opinion.

> "Accordingly, for the reasons assigned, it is ordered that judgment in both cases be entered decreeing:
>
> "1. That all seized materials be returned, instanter, to those from whom they were seized,

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[3] Aside from the limited local application of the ordinance, which bars a direct appeal under *Moody* v. *Flowers*, 387 U. S. 97 (1967), there is a question whether a successful party can properly maintain an appeal. The statute, 28 U. S. C. § 1253, permits a direct appeal only from an order granting or denying an injunction. The State successfully opposed an injunction against the enforcement of the parish ordinance in the court below and now cannot appeal from its victory. See *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U. S. 383, 391 (1970) (WHITE, J., concurring).

"2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

"3. That the preliminary and permanent injunctions prayed for be denied, and

"4. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper."

The order of the single-judge District Court is as follows:

"For the reasons assigned in the foregoing 3-Judge Court opinion, it is ordered that judgment be entered herein decreeing:

"1. That St. Bernard Parish Ordinance No. 21–60 is unconstitutional.

"2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper." 304 F. Supp., at 670–671.

The fact that the clerk of the District Court merged these orders into one judgment does not confer jurisdiction upon this Court. In the first place, our jurisdiction cannot be made to turn on an inadvertent error of a court clerk. Second, the jurisdictional statute by its own terms grants a direct appeal from "an *order* granting or denying" an injunction. 28 U. S. C. § 1253. (Emphasis added.) Since the order entered by the three-judge court omits any reference to declaratory relief, the discussion of such relief in the court's opinion is dictum.

The judgment of the court below is reversed insofar as it grants injunctive relief. In all other respects the judgment is vacated and the case remanded to the United States District Court with instructions to enter a fresh decree from which the parties may take an appeal to the Court of Appeals for the Fifth Circuit if they so desire.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring.

In joining the opinion and judgment of the Court, I add these few concurring words.

The three-judge District Court's decree suppressing the use of the seized material as evidence and ordering its return to the appellees was an injunctive order, from which an appeal was properly taken directly to this Court. 28 U. S. C. § 1253. The decree was plainly wrong under *Stefanelli* v. *Minard*, 342 U. S. 117, and I agree that it must be reversed. In *Stefanelli* we affirmed the refusal of a federal district court to suppress the use in a pending state prosecution of evidence that the petitioners alleged had been obtained in an unlawful search. Our ruling there is clearly applicable to the facts before us:

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U. S., at 120.

See also *Cleary* v. *Bolger*, 371 U. S. 392, 400.

I also agree that the appeal from the declaratory judgment holding the parish ordinance unconstitutional is not properly before us. This Court has no power to consider the merits of that appeal for two quite distinct reasons, each sufficient to defeat our jurisdiction. First, the ordinance is neither a state statute nor of statewide application. The case thus presents *a fortiori* the situation in which the Court found no jurisdiction in *Moody* v. *Flowers*, 387 U. S. 97, 101. Second, the appeal is from the grant of declaratory relief, not from the grant or denial of an injunction, and jurisdiction under 28 U. S. C. § 1253 is therefore lacking. *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U. S. 383; *id.*, at 391 (WHITE, J., concurring).

This is not a case in which the District Court's action on the prayer for declaratory relief was so bound up with its action on the request for an injunction that this Court might, on direct appeal, consider the propriety of declaratory relief on pendency grounds. Cf. *Zwickler* v. *Koota*, 389 U. S. 241; *Samuels* v. *Mackell, ante*, p. 66. Indeed, the District Court itself recognized that the request for a declaratory judgment regarding the local ordinance was so unrelated to the prayer for injunctive relief against the state statute that the single District Judge entered a separate order declaring the ordinance unconstitutional.

MR. JUSTICE DOUGLAS, dissenting in part.

I

The three-judge panel was properly convened under 28 U. S. C. § 2281 to consider the validity of a Louisiana statute of general application. That court was also asked, however, to pass on an ordinance of St. Bernard Parish. But I agree with part III of the opinion of the Court written by MR. JUSTICE BLACK that we have no jurisdiction over that phase of the litigation.

It is by now elementary that a three-judge court may not be convened to consider the validity of a local ordinance or a statute of local application. *Moody* v. *Flowers*, 387 U. S. 97, 101. The three-judge court recognized that it had no jurisdiction to pass upon the constitutionality of the ordinance; but it expressed "its views . . . in the interest of judicial economy [since it was] shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." 304 F. Supp. 662, 670 n. 31. It then stated that "[W]e have examined the ordinance and find it to be unconstitutional and unenforceable." *Id.*, at 670.

The single District Judge then ordered that a judgment be entered, holding that the ordinance was uncon-

stitutional. 304 F. Supp., at 671. That order is obviously the judgment which is the basis of an appeal. Later on, the clerk also entered a judgment to that effect for the three-judge court.

The judgment entered pursuant to the order of the single District Judge should go to the Court of Appeals for review, not to this Court. Moreover, even if the judgment entered by the clerk was authorized by the three-judge court, it is not properly here. For the order or judgment concerning the ordinance would be here only if the three-judge court had pendent jurisdiction over the claim.

Pendent jurisdiction does extend to nonconstitutional grounds for challenging a statute when a constitutional challenge is also raised. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175; *Davis* v. *Wallace*, 257 U. S. 478; *Sterling* v. *Constantin*, 287 U. S. 378, 393; *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 75–85; and *Flast* v. *Cohen*, 392 U. S. 83, 88–91. State causes of action have been appended to federal causes of action in a one-judge court where all causes of action arose out of the same set of facts. *United Mine Workers* v. *Gibbs*, 383 U. S. 715. This case, however, does not involve a challenge to one statute or a request for one award of relief on different grounds, but a challenge to two different laws on the same grounds. The only argument for considering both these laws together is that Ledesma was charged under both. This is not sufficient, under any ruling of this Court, to give jurisdiction, on direct appeal, over the ruling. The appellants did not challenge the jurisdiction of the three-judge court or the appellate jurisdiction of this Court over this claim. But subject matter jurisdiction of the federal courts may not be bestowed by the parties. *United States* v. *Griffin*, 303 U. S. 226, 229. The cases cited by appellants do not support jurisdiction

over this claim. *Zemel* v. *Rusk*, 381 U. S. 1, allowed a challenge to an administrative action, as not authorized by statute, to be joined with a constitutional attack on the statutes which purportedly authorized the action. *Milky Way Productions* v. *Leary* (together with *New York Feed Co.* v. *Leary*), 305 F. Supp. 288, was a *per curiam* affirmance, without opinion. 397 U. S. 98. The issues presented to this Court were conceded by all parties to be constitutional attacks on the obscenity statutes and the arrest warrant statutes of New York. Because the three-judge court had jurisdiction over the attack on the arrest warrant statutes, independent of any other claim, the issue of pendent jurisdiction was not involved and was not raised.* Therefore, that problem was not considered in our *per curiam*, and our affirmance was not a holding on pendent jurisdiction. We cannot decide *Perez* on the basis of *Milky Way*, but only on the basis of applicable precedent and reason. And no precedent or reason is advanced for any enlargement of pendent jurisdiction.

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*None of the parties raised any question concerning pendent jurisdiction in this Court.

New York Feed complained that the arrest, without prior adversary hearing, was unconstitutional.

Milky Way attacked the arrest warrant statutes as unconstitutional "as applied in law," alleging they were overbroad, an illegal prior restraint, and vague.

The Attorney General of New York, in both cases, treated the claim as an attack on the constitutionality of the arrest warrant statutes and argued that they were constitutional.

The District Attorney argued that petitioners' attack on the arrest warrant statutes was improper because they did not preclude the adversary hearing. He did not, however, raise any jurisdictional questions as to the power of the three-judge court to pass on the legality of the arrests.

The city of New York raised no jurisdictional challenge.

In reply, both petitioners argued that the arrest warrant statutes were "unconstitutional as applied in law."

If a rewriting of the law on pendent jurisdiction is to be done, the Congress should do it.

The present judgment should be reviewed in the Court of Appeals, not here. *Rorick* v. *Comm'rs*, 307 U. S. 208.

II

As to the orders of the three-judge court suppressing evidence in the prosecution under the Louisiana statute, which the Court sets aside, I dissent. My views, which are not congenial to the majority, are set forth at some length in *Younger* v. *Harris, ante*, p. 58, and *Dyson* v. *Stein, post*, p. 204, decided this day.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante*, p. 37; No. 7, *Samuels* v. *Mackell*, and No. 9, *Fernandez* v. *Mackell, ante*, p. 66; No. 4, *Boyle* v. *Landry, ante*, p. 77; No. 83, *Byrne* v. *Karalexis, post*, p. 216; and No. 41, *Dyson* v. *Stein, post*, p. 200, all decided today.

Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., an owner, for displaying obscene materials for sale. On February 10, 1969, four informations were filed in the state district court, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, La. Rev. Stat. Ann. § 14:106 (Supp. 1970), and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21–60. The statute and ordinance appear as an Appendix to this opinion. On Febru-

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ary 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a judgment under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, declaring the state statute and parish ordinance unconstitutional; an injunction against pending and future prosecutions under either enactment; and an injunction directing the return of the seized magazines, books, and playing cards and suppressing their use as evidence in any pending or future criminal prosecution against the appellees. A three-judge court was convened. Prior to the federal court hearing, the appellant entered a *nolle prosequi* in the state court on the two informations charging violation of the parish ordinance.

The three-judge court filed an opinion holding (a) that the Louisiana statute was constitutional on its face; (b) that the parish ordinance was unconstitutional on its face; and (c) that the arrest of appellee Ledesma and the seizure of the magazines, books, and playing cards were unconstitutional in the absence of a prior judicial adversary hearing determining that the seized materials were obscene. 304 F. Supp. 662 (1969). The court stated that because it was confident the appellants would comply with the court's views it was "unnecessary to issue any injunctions" against "pending or future prosecutions or future arrests and seizures." 304 F. Supp., at 670. In pertinent part the judgment entered on August 14, 1969, therefore decreed:

> "1. That all seized materials be returned, instanter, by the [appellants] to those [appellees] from whom they were seized,
>
> "2. That said materials be suppressed as evidence in any pending or future prosecutions of the [appellees],

"3. That the preliminary and permanent injunctions prayed for be denied,

"4. That St. Bernard Parish Ordinance No. 21–60 is unconstitutional." App. 106–107.

We postponed consideration of the question of jurisdiction to the hearing on the merits. 399 U. S. 924 (1970). In addition to the questions presented in the jurisdictional statement, our order requested the parties to brief and argue the following questions:

"(1) Was it an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the state prosecution charging violation of Louisiana Revised Statutes § 14:106?

"(2) Was it an appropriate exercise of discretion for the three-judge court in paragraph 4 of said judgment to declare the St. Bernard Parish Ordinance No. 21–60 unconstitutional?"

I agree with the Court (1) that this is a proper appeal to this Court, and (2) that it was not an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969. I dissent, however, from the holding of the Court that the declaratory judgment which is paragraph 4 of the judgment of the three-judge court is not properly before us for review. I think that it is and, on the merits, would hold that it was an appropriate exercise of discretion for the court in paragraph 4 to declare St. Bernard Parish Ordinance No. 21–60 unconstitutional. I would, therefore, reverse and set aside paragraphs 1 and 2 of the judgment of August 14, 1969, but in all other respects would affirm that judgment.

I

Jurisdiction

Appellants' assertion of a right of direct appeal to this Court relies upon 28 U. S. C. § 1253. That section permits an appeal in any civil action required to be heard and determined by a district court of three judges "from an order granting or denying . . . an interlocutory or permanent injunction." [1] Paragraph 3 of the order of August 14, 1969, decrees: "That the preliminary and permanent injunctions [against pending and future prosecutions] prayed for be denied." But § 1253 does not permit these appellants to appeal this portion of the judgment, since they prevailed to the extent of this denial of appellees' prayers for injunctive relief. *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U. S. 383, 391 (1970) (WHITE, J., concurring). However, paragraphs 1 and 2 of the judgment are injunctive orders against appellants directing them not to use the seized materials as evidence against appellees in any pending or future prosecutions and directing the return of those materials. These provisions clearly qualified the judgment as an order "granting . . . an . . . injunction," from which appellants could appeal directly to this Court.

II

The Injunctions

The companion cases decided today hold that a federal court should not interfere by injunction with an existing

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[1] The full text of 28 U. S. C. § 1253 is as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

state criminal prosecution pending against the federal court plaintiff at the time the federal action is brought, except upon a showing that great, immediate, and irreparable injury is threatened. Such a showing may be, for example, in the form of bad-faith harassment of the federal court plaintiff by state law enforcement officials. These decisions adhere to the policy established by this Court that, in the absence of such showing, "[i]t is generally to be assumed that state courts and prosecutors will observe [in the pending prosecution] constitutional limitations as expounded by this Court." *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 (1965). While the three-judge court sustained the constitutionality of the state statute on its face (a holding not before us on this appeal), the court interfered with the pending state prosecution under the statute to the extent of ordering the return of the seized materials and suppressing their use as evidence in the prosecution, thus leaving the State free to proceed with the prosecution on the basis of other evidence. This interference was improper on this record. There is an utter absence of any evidence that the seizures and the arrest of appellee Ledesma, and the filing of the informations accusing Ledesma of violation of the state statute, were undertaken in bad faith to harass appellees, or for any purpose except the good-faith enforcement of the State's criminal laws. I have no occasion to consider, and intimate no view upon, the holding of the Federal District Court that, as to the seizures and the arrest of appellee Ledesma, "the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity." 304 F. Supp., at 667.[2] That appeal to federal constitutional pro-

[2] For a contrary view to that of this three-judge court as to the necessity of a hearing prior to an arrest for obscenity, see *Milky Way Productions* v. *Leary*, 305 F. Supp. 288, 295–297 (SDNY 1969), aff'd, 397 U. S. 98 (1970).

tections was open to appellee Ledesma in the state prosecution by way of challenge, in any manner permitted by Louisiana criminal procedure, to the validity of the arrest, and objections to admission into evidence of, or motions to suppress use of, the materials. In *Dombrowski*, the Court expressly included controversies over the admissibility of evidence as controversies which, without more, involved "no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a [state] criminal prosecution." 380 U. S., at 485. The Court said: "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment." *Id.*, at 485 n. 3. While there may be circumstances in which a federal court could properly adjudicate such a claim, this record discloses none which justified this three-judge court in doing so. I therefore join the Court in concluding that paragraphs 1 and 2 of the judgment should be reversed and set aside.

III

The Declaratory Judgment as to the Parish Ordinance

Threshold questions must be answered before the merits of the declaratory judgment which is paragraph 4 of the judgment of the three-judge court are reached.

The first threshold question is whether the declaratory judgment is properly before us for review. Two opinions, both written by Judge Boyle who initiated the three-judge panel, were filed on July 14, 1969, one for the three-judge court and the other a separate opinion of Judge Boyle. Judge Boyle's opinion for the three judges explained: "Although it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance,

as distinguished from statutes of state-wide application, Moody v. Flowers, 387 U. S. 97 (1967), the court takes this opportunity to express its views on the constitutionality of the ordinance in the interest of judicial economy. The view expressed by this court concerning the constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference *in his opinion* issued contemporaneously herewith." 304 F. Supp., at 670 n. 31 (emphasis added). Judge Boyle's separate opinion was a brief statement: "For the reasons assigned in the foregoing 3-Judge Court opinion, it is ordered that judgment be entered herein decreeing: 1. That St. Bernard Parish Ordinance No. 21–60 is unconstitutional. 2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper." 304 F. Supp., at 671.

The Court holds that we have no jurisdiction to review the declaratory judgment on the premise that the declaratory judgment against the local ordinance was not issued by the three-judge court but rather by Judge Boyle acting as a single judge. With all respect this is not the case. Both the Court and my Brothers DOUGLAS and STEWART insist that Judge Boyle's separate statement was in fact a judgment. I would suppose Judge Boyle himself is the best authority as to that and he expressly referred to the statement as "his opinion." Appeals are, of course, taken from judgments and not from opinions. No judgment was entered by Judge Boyle pursuant to his separate opinion and therefore there existed no judgment pursuant to the order of the single judge to go to the Court of Appeals for review. The only judgment entered in the case was that entered by the three-judge court on August 14, 1969. Since the injunctions in paragraphs 1 and 2 rendered that judgment appealable directly to this Court, paragraph 4 of that judgment, the declaratory judgment, is necessarily before us.

However, other considerations require that we decide whether the three-judge court properly rendered the declaratory judgment. Our *per curiam* affirmance in *Milky Way Productions* v. *Leary*, 305 F. Supp. 288 (SDNY 1969), aff'd, 397 U. S. 98 (1970), fully supports the action of the three-judge court in doing so. That case did not present attacks on a statute and ordinance but rather attacks on two different New York statutes. The first attack was on N. Y. Penal Law § 235.00 (1965), New York's general obscenity statute. The second attack was on N. Y. Code Crim. Proc. §§ 148–150 (Supp. 1970–1971). The District Court held that a three-judge court was required to deal with the attack on § 235.00 since the claim was that that section was facially unconstitutional. However, the attack on §§ 148–150 of the Code of Criminal Procedure was not that those sections were facially unconstitutional but only that those sections were unconstitutionally invoked before there had been an adversary judicial determination on the obscenity of the publications in question (*i. e.*, as applied). The District Court acknowledged that the attack on the Code provisions was thus probably not for determination by three judges, but "as a simple claim of official lawlessness, cognizable by one judge." 305 F. Supp., at 295. Nevertheless, the District Court, invoking the principle that once three-judge court jurisdiction is established on one claim, the court may consider other issues that alone would not have called for three judges, held that, since there was three-judge jurisdiction of the claim of the facial unconstitutionality of § 235.00, jurisdiction existed also to determine the merits of the claim that the criminal procedure provisions were unconstitutionally applied. 305 F. Supp., at 295–296. Our affirmance sustained this holding. Plainly that affirmance governs this case and sustains the propriety of the action of the three-judge court in passing on the constitutionality of the ordinance. Ap-

pellants concede that *Milky Way* forecloses any challenge on their part to the action of the three-judge court. Indeed, they regard the action of the three-judge court as supported by the cases in this Court authorizing three-judge courts to consider attacks on statutes on nonconstitutional grounds when those courts are properly convened to hear constitutional challenges to the statutes.[3]

The appellants argue, however, that no controversy requisite to relief under the Federal Declaratory Judgment Act existed after the *nolle prosequi* was entered. This argument presents the second threshold question.

Appellants rely upon *Golden* v. *Zwickler*, 394 U. S. 103 (1969). In that case a New York criminal statute prohibited the distribution of anonymous handbills in election campaigns. A distributor of anonymous handbills opposing the re-election of a Congressman sought in federal court a judgment declaring the statute unconstitutional. The federal action was brought after reversal by the New York courts of the appellee's conviction for distributing handbills during an earlier campaign of the Congressman. See *Zwickler* v. *Koota*, 389 U. S. 241 (1967). Appellee desired to distribute handbills during a forthcoming campaign of that Congressman, but the Congressman had retired from Congress to become a justice of the New York Supreme Court. In those circumstances the Court held that no "controversy" requisite to declaratory relief existed, since Zwickler's only target was a particular Congressman and "the prospect was neither real nor immediate of a campaign involving the Congressman." 394 U. S., at 109.

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[3] *Flast* v. *Cohen*, 392 U. S. 83, 88–91 (1968); *Zemel* v. *Rusk*, 381 U. S. 1, 5–7 (1965); *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287–288 (1963); *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 75–85 (1960); *Milky Way Productions* v. *Leary*, 305 F. Supp., at 295.

The situation here is quite different, however. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). Appellees' complaint expressly alleges, and there was no evidence or finding to the contrary, that appellees "desire to continue to keep for sale and to sell" the publications and playing cards in question. Thus, unlike the situation in *Golden*, the question of the constitutionality of the ordinance is "presented in the context of a specific live grievance." 394 U. S., at 110. This conclusion is buttressed by the finding of the three-judge court that "[appellees] fear prosecution [under the ordinance] at some future date." 304 F. Supp., at 670. Indeed, in light of the appellants' aggressive prosecution of appellees, the inference is permissible that any attempts by appellees to continue to display the questioned publications for sale might well again be met with prosecutions under both the statute and ordinance. There is no question that there is a continuing controversy between the appellants and the State involving the sale of allegedly obscene publications. Appellants did not assert the contrary before the District Court, nor do they assert the contrary here.[4] I conclude that

[4] Despite the order to return the seized materials, appellants were not without evidence on which to prosecute appellee Ledesma. The evidence obtained on the night of January 27, 1969, was not just the seized materials. The parties stipulated at the hearing before the three-judge court that immediately before a sheriff's officer arrested Ledesma, the officer purchased two allegedly obscene magazines from Ledesma, and that another officer purchased two other and different publications from him. The District Court expressly excepted these purchased publications from those ordered returned,

it cannot be said that the three-judge court erred in finding that there existed the "controversy" requisite under the Federal Declaratory Judgment Act.

The third threshold question is whether the state prosecution under the ordinance was "pending" so as to make federal intervention inappropriate. The fact is, as I have already noted, that informations against appellee Ledesma for violation of the ordinance were outstanding when this federal suit was filed. However, the *nolle prosequi* of those informations was entered before the three-judge court convened and heard the case. That court therefore treated the case as one in which no prosecution under the ordinance was pending. This was not error. The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the hearing and not upon the situation when the federal suit was initiated. See *Golden* v. *Zwickler*, 394 U. S., at 108. The principles of comity as they apply to federal court intervention, treated by the Court today in Nos. 2, 4, 7, 9, 41, and 83, see *supra*, at 93, present this issue. The key predicate to answering the question whether a federal court should stay its hand, is whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined. Ordinarily, that question may be answered merely by examining the dates upon which the federal and state actions were filed. If the state prosecution was first filed and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene. When, however, as here, at the time of the federal hearing there is no state prosecution to which the federal

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saying, "Of course, [appellants] cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto has passed." 304 F. Supp., at 667 n. 22.

court plaintiff may be relegated for the assertion of his constitutional defenses, the primary reason for refusing intervention is absent. Here, there was no other forum for the adjudication of appellees' constitutional objections to the ordinance.

There is, of course, some intrusion into a state administration of its criminal laws whenever a federal court renders a declaratory judgment upon the constitutionality of a state criminal enactment. The Court holds today in *Samuels* v. *Mackell, supra,* that considerations of federalism ordinarily make the intrusion impermissible if a state prosecution under that enactment is proceeding at the time the federal suit is filed. The Court says, "[I]n cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Id.,* at 73. But considerations of federalism are not controlling when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such case, the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.

The controversy over the power of federal courts to declare state statutes unconstitutional and to enjoin their enforcement has roots that reach back at least to *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), where in a contract action this Court held that a State could be sued by a citizen of another State. "That decision . . . created such a shock of surprise throughout the country that, at the

first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States." *Hans* v. *Louisiana*, 134 U. S. 1, 11 (1890) (Bradley, J.). The amendment was thought to have overruled *Chisholm*. Although the amendment might have been construed to give a broad immunity from federal suits to States and state officials acting pursuant to state policy, that construction was rejected in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 847–848 (1824). *Osborn* involved a confiscatory state tax on a federal instrumentality. In sustaining a federal court injunction against the state tax, Chief Justice Marshall analyzed the controversy over federal judicial power as testing the viability of our federal system:

> "The eleventh amendment . . . has exempted a State from the suits of citizens of other States . . . ; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.
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> "Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.
>
> "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States." 9 Wheat., at 847–848.

Though recognizing the sensitivity of granting injunctions in this context, the Court held that neither the Eleventh Amendment nor any principles of federalism prevented the lower federal courts from giving such relief where necessary to vindicate paramount federal law in a case where a State was not itself a party of record. The broad reach of the reasoning in *Osborn* has since been qualified, see generally L. Jaffe, Judicial Control of Administrative Action 213–222 (1965), but the basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9–18 (1891); *Ex parte Young*, 209 U. S. 123 (1908); *Truax* v. *Raich*, 239 U. S. 33, 37–38 (1915); *Terrace* v. *Thompson*, 263 U. S. 197, 214–215 (1923). See also *Leiter Minerals* v. *United States*, 352 U. S. 220, 225–226 (1957) (Frankfurter, J.).

Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between *Osborn* and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights. This history was reviewed in *Zwickler* v. *Koota*, 389 U. S., at 245–249. The principal foundations of the expanded federal jurisdiction in constitutional cases were the Civil Rights Act of 1871, 17 Stat. 13, which in § 1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal-question

jurisdiction, see 28 U. S. C. § 1331. These two statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court.

Ex parte Young involved a state regulatory statute with penal sanctions. At the suit of railroad stockholders, a federal circuit court temporarily enjoined the railroad from complying with the statute, and also temporarily enjoined Young, the state Attorney General, from instituting any proceedings to enforce the statute. Young nevertheless brought an enforcement proceeding in a state court, and was thereupon held in contempt by the circuit court. He brought habeas corpus in this Court, contending that the circuit court lacked jurisdiction to hold him in contempt. This Court held, first, that the original suit was properly within the general federal-question jurisdiction of the circuit court; second, that "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action," 209 U. S., at 155–156; and, third, that a federal court of equity has power in appropriate circumstances to enjoin a future state criminal prosecution: "When [the state] proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion

of all other courts, until its duty is fully performed." 209 U. S., at 161–162.

The decision in *Ex parte Young* provoked a reaction not unlike that which greeted *Chisholm* v. *Georgia*. Opposition focused principally on the power of lower federal courts, and of single judges of such courts, to issue preliminary injunctions, often *ex parte*, against the enforcement of state statutes, generally regulatory statutes carrying penalties. See generally *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 154 (1963); H. Hart & H. Wechsler, The Federal Courts and the Federal System 848–849 (1953); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803–810 (1934); Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 5–7 (1964). The opinion in *Ex parte Young* anticipated the problem. The Court noted the objection "that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions." 209 U. S., at 166. The same year the case was decided Congress considered a measure to disable the lower federal courts from enjoining enforcement of state statutes, but the proposal failed to attract sufficient support for passage. See 42 Cong. Rec. 4848–4849 (1908). Two years later, a similar measure passed the House, see 46 Cong. Rec. 313, 316 (1910), but the Senate would not accept it. See F. Frankfurter and J. Landis, The Business of the Supreme Court 143 (1927). However, the same year, Congress did respond to *Ex parte Young*. It did not attempt to overrule the case by constitutional amendment or by statute; it did not seek to contain it by expanding the statutory bar against federal injunctions of state proceedings, 28 U. S. C. § 2283, beyond

stays of suits already instituted; it did not follow the precedent of the Eleventh Amendment by excluding a class of litigation from federal jurisdiction; nor did it anticipate the technique of the Norris-LaGuardia Act by forbidding the use of the injunction in a defined class of cases, see 47 Stat. 70, 29 U. S. C. §§ 101–115. Rather, Congress ratified the active role assigned to the federal courts by the post-Civil War legislation and accepted the basic holdings of *Ex parte Young*, but provided that a preliminary injunction against enforcement of a state statute could be issued only by a three-judge district court, see 36 Stat. 557, now 28 U. S. C. § 2281,[5] and that the decision of such a court granting or denying an injunction would be directly appealable to this Court. See 28 U. S. C. § 1253. Thus the Three-Judge Court Act confirmed Congress' acceptance of *Ex parte Young* and the course of federal adjudication of the constitutionality of state statutes which it represented,[6] and Congress has never departed from that

[5] The Three-Judge Court Act of 1910 originally applied only to interlocutory injunctions against enforcement of state statutes. See § 17, 36 Stat. 557. A 1913 amendment extended the requirements to interlocutory injunctions against enforcement of state administrative orders. Act of March 4, 1913, c. 160, 37 Stat. 1013. The Judiciary Act of 1925 extended the three-judge requirement to permanent injunctions. 43 Stat. 938. However, in *Smith* v. *Wilson*, 273 U. S. 388 (1927), it was held that the three-judge requirement applied only where the application for a permanent injunction was coupled with an application for an interlocutory injunction. The 1948 revision of the statute made the three-judge requirement applicable to requests for either interlocutory or permanent relief, whether or not the other form of relief was sought. Act of June 25, 1948, 62 Stat. 968.

[6] In 1913 Congress dealt with another major defect in the federal injunction procedure. Injunction suits were commonly instituted in federal court shortly after the enactment of complex state regulatory measures and prior to their construction by the state courts. The result was that in one case a federal court gave an initial construction to the state statute and then, on the basis of that

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acceptance on any of the several occasions when it has amended the Act. As Professor Wright has written, "[T]he doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law." C. Wright, Handbook of the Law of Federal Courts 186 (2d ed. 1970).[7]

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construction, adjudicated its constitutionality, thereby excluding the state courts altogether. See generally Lockwood, Maw, & Rosenberry, The Use of the Federal Injunction in Constitutional Litigation, 43 Harv. L. Rev. 426, 428–429 (1930). The remedy provided by Congress, 37 Stat. 1013, is currently codified in 28 U. S. C. § 2284, which provides in pertinent part:

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

The statute has proved largely ineffectual principally because of the stay requirement, which protects the constitutional interests of the federal court plaintiffs. See Hart & Wechsler, *supra*, at 854–855; Hutcheson, *supra*, at 822–823; Lockwood, Maw, & Rosenberry, *supra*, at 452–453. However, in cases where construction of complex state regulatory law is critical to a constitutional decision, the federal courts have developed their own techniques for securing state court consideration of issues of state law. See, *e. g.*, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908); *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). The narrow scope of the doctrine of federal abstention was delineated in *Zwickler* v. *Koota*, 389 U. S. 241 (1967). See also ALI, Study of the Division of Jurisdiction Between State and Federal Courts § 1371, pp. 282–298 (1969); Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967).

[7] The American Law Institute, in comments in connection with its proposed codification of the abstention doctrine, observes: "Suits in which it is claimed that state legislative or administrative action is invalid because contrary to controlling federal law present an

During the period leading up to and following *Ex parte Young* the federal injunction suit became the classic method for testing the constitutionality of state statutes.[8] The injunctive remedy was strong medicine, and the Three-Judge Court Act did not eliminate the defects in and the widespread hostility to the injunction procedure. The procedure was unsatisfactory for both private plaintiffs and state defendants: a plaintiff had the burden of proving the traditional equity requirements for an injunction; and if the plaintiff prevailed in court, an injunction issued against the defendant state official, paralyzing enforcement of the state statute pending further review. Consequently, in 1934, without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continuing vitality of *Ex parte Young* with respect to federal injunctions, Congress empowered the federal courts to grant a new remedy, the declaratory judgment. See Act of June 14, 1934, c. 512, 48 Stat. 955, now 28 U. S. C. § 2201.

The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. The House Committee Report stated, "The principle involved in this form of procedure is to confer upon the courts the power to exercise in some in-

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especially appealing case for original federal jurisdiction. The danger of state court hostility to the federal claim is greatest in such suits. Jurisdiction of the federal courts to hear such cases has been established at least since *Ex parte Young*, and it has been rightly observed by a distinguished judge that 'the authority and finality of *Ex parte Young* can hardly be overestimated.' Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 799 n. 9 (1934)." (Citation omitted.) ALI, Study of the Division of Jurisdiction Between State and Federal Courts 282 (1969).

[8] After Congress accepted the basic principles of *Ex parte Young*, this Court promulgated new Rules of Practice for federal equity, which removed many of the objections to equity procedure. See 226 U. S. 627 (1912), and in particular Rule 73, 226 U. S., at 670.

stances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." H. R. Rep. No. 1264, 73d Cong., 2d Sess., 2 (1934). Of particular significance on the question before us, the Senate report makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate:

> "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. . . . It has been employed in State courts . . . for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction.
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> . . . . .
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> "The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin* (284 Ill. 389, 120 N. E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v.

Buckner (156 Tenn. 278, 300 S. W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy. . . .

"The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. For example, in the case of *Pierce* v. *Society of Sisters* (268 U. S. 510, 525 . . . 1925), the court issued an injunction against the enforcement of an Oregon statute which was not to come into force until 2 years later; in rendering a judgment declaring the statute void, the court in effect issued a declaratory judgment by what was, in effect, apparently, an abuse of the injunction. See also *Village of Euclid* v. *Ambler Realty Co.* (272 U. S. 365 . . . 1926). Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments.

. . . . . .

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace* v. *Thompson* (263 U. S. 197, 216 . . . 1923), by Butler, J., when it said:

" 'They are not obliged to take the risk of prosecutions, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.' " S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3, 6 (1934).

Both before and after the enactment of the Federal Declaratory Judgment Act, the practice of those States that provided a declaratory remedy was to make it available

to test the validity of criminal legislation. See E. Borchard, Declaratory Judgments 1024 (2d ed. 1941). Professor Borchard, a leading proponent of the Act, testified: "Most courts are unwilling to grant injunctions . . . on the ground that it is a criminal statute, but you can get a declaratory judgment in States that have it." Hearings on H. R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 19 (1928). He testified further that "when Federal courts do get power to render declaratory judgments, instead of rendering an injunction, as is now done, that requires three judges, plaintiff will get a declaratory judgment. You would not be able to get an injunction, in such cases, from one judge, but you could get a declaratory judgment as to your rights." *Id.*, at 39. Indeed, early in the history of the Act this Court applied it to test the constitutionality of a federal statute carrying criminal sanctions. See *Currin* v. *Wallace*, 306 U. S. 1 (1939). Professor Borchard also introduced a written statement in the hearings, which stated in part:

> "[T]he declaratory judgment serves another useful purpose. It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of

> compelling a violation of the statute as a condition precedent to challenging its constitutionality." Hearings on H. R. 5623, *supra*, at 75–76.

The legislative history of the Federal Declaratory Judgment Act is overwhelming that declaratory judgments were to be fully available to test the constitutionality of state and federal criminal statutes. Much of the hostility to federal injunctions referred to in the Senate report was hostility to their use against state officials seeking to enforce state regulatory statutes carrying criminal sanctions; this was the strong feeling that produced the Three-Judge Court Act in 1910, the Johnson Act of 1934, 28 U. S. C. § 1342, and the Tax Injunction Act of 1937, 28 U. S. C. § 1341. The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether. See discussion, *infra*, at 126–128, of *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943). Moreover, the Senate report's clear implication that declaratory relief would have been appropriate in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), both cases involving federal adjudication of the constitutionality of a state statute carrying criminal penalties, and the report's quotation from *Terrace* v. *Thompson*, which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaraory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes.

This history compels rejection of the Court's suggestion, *ante*, at 86 n. 2, that although no informations were pending at the time of the hearing, declaratory relief was inappropriate in the absence of a showing "that appellees would suffer irreparable injury of the kind necessary to

justify federal injunctive interference with the state criminal processes." Congress expressly rejected that limitation and to engraft it upon the availability of the congressionally provided declaratory remedy is simply judicial defiance of the congressional mandate. It is nothing short of judicial repeal of the statute. If the statute is to be repealed or rewritten, it must be done by Congress, not this Court.

Ex parte Young makes clear that the most significant factor determining the propriety of federal intervention is whether a state proceeding exists that was initiated *before* the federal suit was filed. The Court there upheld a federal court's injunction against future state proceedings where the injunction was in aid of the federal court's jurisdiction, but the Court expressly excepted from its holding the case where a state proceeding exists which was pending at the time federal jurisdiction attached. Specifically, the Court stated, "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." 209 U. S., at 162. The Court cited *Harkrader* v. *Wadley*, 172 U. S. 148 (1898), in support, thus making clear that the ruling was influenced by the statutory provision, first enacted in 1793, prohibiting federal injunctions against proceedings pending in any court of a State. The history of that provision, now 28 U. S. C. § 2283, was recently traced in *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970). However, the statutory bar applies only to prosecutions begun *before* the federal suit is filed and does not preclude injunctions against the institution of *future* prosecutions. See generally Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 366–378 (1930). Thus, the general rules that follow from *Ex parte Young* are, first, that where there is no pending state proceeding when the federal suit is filed, a federal court can adjudicate consti-

tutional claims against state officials and issue such orders as are necessary to preserve its jurisdiction; and, second, that where a state proceeding exists that was pending at the time suit was filed in federal court the federal court should ordinarily decline to render either declaratory or injunctive relief.[9]

These rules were developed further in the light of additional considerations in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). *Dombrowski* confirmed the well-established principle that constitutional defenses to a state criminal charge must be initially tested in state rather than in federal courts. See *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943); *Cameron* v. *Johnson,* 390 U. S. 611, 618 (1968); compare *Stefanelli* v. *Minard,* 342 U. S. 117 (1951), with *Rea* v. *United States,* 350 U. S. 214 (1956). However, *Dombrowski* also recognized that exceptional circumstances may justify federal intervention when the opportunity to raise constitutional defenses at the state criminal trial does not assure protection of the constitutional rights at stake. *Dombrowski* considered two situations in which "exceptional circumstances" can exist. First, if in order to discourage conduct protected by the First Amendment or by some other provision of the Constitution,[10] a State brings or threatens to

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[9] I put to one side the question not presented in *Ex parte Young,* or in this case, whether federal court relief would be proper when a state prosecution pending at the time of the federal hearing was begun after the federal suit was filed.

[10] Declaratory relief should be available, whether the conduct inhibited is expressive or other conduct alleged to be protected by the Constitution. Of course, the special sensitivity and importance of First Amendment rights (their sensitivity to "chilling") is a necessary consideration in evaluating the claim of inhibition. The deterrence emanating from the existence of a statute purporting to prohibit constitutionally protected expression is itself plainly inconsistent with the First Amendment, *Zwickler* v. *Koota,* 389 U. S. 241,

bring a criminal prosecution in bad faith for the purpose of harassment, the bringing of the prosecution or the threat is itself a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear, and there then exists a situation "in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." [11] *Dombrowski* v. *Pfister, supra,* at 485; see *Cameron* v. *Johnson, supra,* at 621; cf. *Achtenberg* v. *Mississippi,* 393 F. 2d 468, 474–475 (CA5 1968). Accordingly, in this context a civil suit is an appropriate means to cut short the unconstitutional state prosecution. The civil suit for remedial relief may appropriately be brought in federal court since the federal courts are the primary guardians of constitutional rights. *Zwickler* v. *Koota, supra.* Second, where a criminal statute prohibits or seems to prohibit constitutionally protected conduct, and to that extent is unconstitutionally vague or overbroad (a contention not made as to the state statute in this case), the opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights, since in that

252 (1967); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), which was intended to protect vigorous, robust, and unpopular speech without a threat of punishment under state law. See, *e. g., Whitney* v. *California,* 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); *Stromberg* v. *California,* 283 U. S. 359, 369 (1931); *Roth* v. *United States,* 354 U. S. 476, 484 (1957); *NAACP* v. *Button,* 371 U. S. 415, 429 (1963); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).

[11] Bad-faith harassment can, of course, take many forms, including arrests and prosecutions under valid statutes where there is no reasonable hope of obtaining a conviction, see, *e. g., Cameron* v. *Johnson, supra,* at 621, and a pattern of discriminatory enforcement designed to inhibit the exercise of federal rights, see, *e. g., Bailey* v. *Patterson,* 323 F. 2d 201 (CA5 1963). Cf. ALI, Study of the Division of Jurisdiction Between State and Federal Courts § 1372 (7), pp. 308–310 (1969).

situation a substantial number of people may well avoid the risk of criminal prosecution by abstaining from conduct thought to be proscribed by the statute. Even persons confident that their contemplated conduct would be held to be constitutionally protected and that accordingly any state conviction would be overturned may be deterred from engaging in such conduct by the prospect of becoming enmeshed in protracted criminal litigation, and by the risk that in the end, years later, their confidence will prove to have been misplaced and their resources wasted. This deterrence is magnified by the scope that vagueness or overbreadth gives for discriminatory or capricious enforcement. Federal anticipatory relief is justified here because it is a principal function of the federal courts to vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them.[12] Thus in *Dombrowski* we held that in cases in these categories federal courts may properly intervene in order to assure the full protection of federal constitutional rights.[13]

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[12] The federal declaratory judgment is not a prize to the winner of a race to the courthouses, but rather a declaration of rights that obviates the need to risk a state criminal proceeding or a race to the courthouses. Within the limits of Art. III, see *Golden* v. *Zwickler*, 394 U. S. 103 (1969), doctrines of ripeness should be so fashioned as to give adequate room for this kind of relief.

[13] Title 28 U. S. C. § 1343 is an independent basis of federal jurisdiction where the plaintiff seeks vindication of constitutional rights; and, where this provision is invoked together with 42 U. S. C. § 1983, exhaustion of state remedies is not required. *McNeese* v. *Board of Education*, 373 U. S. 668 (1963). Federal court abstention is particularly inappropriate in cases brought under the statutes designed specifically to authorize federal protection of civil rights. As Professor Wechsler has stated, "There Congress has declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the

Taken together, the principles of *Ex parte Young* and *Dombrowski* establish that whether a particular case is appropriate for federal intervention depends both on whether a state proceeding is pending and on the ground asserted for intervention. Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means, and does not necessarily require a decision on the constitutionality of a state statute. It simply prevents particular unconstitutional use of the State's criminal law in bad faith against the federal plaintiff. Under *Douglas* v. *City of Jeannette, supra,* at 164, a person has no immunity from a state prosecution "brought lawfully and in good faith," but he is entitled to federal relief from a state prosecution which amounts to bad-faith harassment.[14]

The situation is different where the plaintiff seeks federal intervention on the ground that a state statute is unconstitutional, but does not allege facts showing bad-faith harassment. In cases of this sort, on whatever provision the claim of unconstitutionality rests, the justification for intervention is that individuals should be able to exercise their constitutional rights without running the risk of becoming lawbreakers. This justification applies with full force where there is a continuing live controversy and federal intervention is sought when there is no state prosecution in which the statute may be tested. However, where federal intervention is sought after a

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state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 230 (1948).

[14] Whether in this context 28 U. S. C. § 2283 bars injunctive relief I need not consider since there is no injunction here.

state prosecution has commenced and while it is pending, the interests protected by federal intervention must be weighed against the broad countervailing principles of federalism. The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded. Moreover, federal intervention may disrupt the state proceeding through the issuance of necessary stays or the burdensome necessity for the parties to proceed in two courts simultaneously. Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process. For these reasons, federal courts should not ordinarily intervene by way of either declaratory or injunctive relief in cases where a state court prosecution exists that began before the federal suit was filed, and the federal court plaintiff alleges only that the state statute being applied to him is unconstitutional. Cf. *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494–495 (1942); Wright, *supra*, at 205. The interests served by federal intervention in that context are plainly outweighed by the principles of comity essential to our federal system.

When no state proceeding is pending and federal intervention is therefore appropriate,[15] the federal court must decide which of the requested forms of relief should be granted. Ordinarily a declaratory judgment will be appropriate if the case-or-controversy requirements of Article III are met, if the narrow special factors war-

[15] I do not consider here the types of relief available in cases of bad-faith harassment discussed *supra*, at n. 11.

ranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute. See generally *Zwickler* v. *Koota, supra; Golden* v. *Zwickler, supra.* This general rule carries out the unambiguous intention of Congress expressed in the Federal Declaratory Judgment Act and reflected in the committee reports, *supra.* The propriety of an injunction should be considered separately and in light of the traditional requirements of equity jurisprudence as applied to the protection of constitutional rights. See, *e. g., Douglas* v. *City of Jeannette, supra; Ex parte Young, supra; Dombrowski* v. *Pfister, supra; Cameron* v. *Johnson, supra; Zwickler* v. *Koota, supra;* see also Hart & Wechsler, *supra,* at 862–864.

It follows that the Court's statement today in *Samuels* v. *Mackell,* that in cases where the state criminal prosecution is pending, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration . . . in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible . . . declaratory relief should ordinarily be denied as well," is not applicable when determining whether to issue a declaratory judgment in a case where no state criminal prosecution is pending. Its applicability is precluded by the nature of the remedy created by the Federal Declaratory Judgment Act, and by our decisions under the Act, culminating in *Zwickler* v. *Koota, supra,* which establish that the considerations governing the grant of a declaratory judgment are quite different from those governing the grant of an injunction, even though both forms of relief are discretionary and thus, in the broad sense of the term, "equitable" in nature. The application of the *Mackell* statement when no criminal prosecution is pending would run counter to our decision this Term in *Wisconsin* v. *Constantineau,* 400 U. S. 433, decided January 19, 1971, where we flatly rejected the

proposition that federal courts should stay their hand until the state courts have been asked to pass on a statute clearly unconstitutional on its face. We there said:

> "Congress could of course have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress [in the first Judiciary Act, 1 Stat. 73] resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, which today involve most federal constitutional rights. . . .
>
> ". . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand and not decide the question before the state courts decided it." 400 U. S., at 437–438, 439.

Moreover, the prerequisites for injunctive and declaratory relief are different. The availability of an alternative adequate legal remedy ordinarily bars an injunction, but does not bar declaratory relief, see Fed. Rule Civ. Proc. 57, unless the alternative remedy was expressly created by statute. See *Katzenbach* v. *McClung*, 379 U. S. 294, 295–296 (1964). Similarly, irreparable injury must be shown in a suit for an injunction, but not in an action for declaratory relief. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937). Of course, neither remedy may be afforded in the absence of a live controversy. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113 (1920); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *Zwickler* v. *Koota, supra*, at 244 n. 3. However, the existence of an actual controversy and the adequacy of declaratory relief to resolve it are issues often presenting particular difficulty in declaratory judgment actions, and it is to these

issues that judicial discretion in such actions is primarily directed. See *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237 (1952).

The effects of injunctive and declaratory relief in their impact on the administration of a State's criminal laws are very different. See generally *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 152–155 (1963). An injunction barring enforcement of a criminal statute against particular conduct immunizes that conduct from prosecution under the statute. A broad injunction against all enforcement of a statute paralyzes the State's enforcement machinery: the statute is rendered a nullity. A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action. See *Flemming* v. *Nestor*, 363 U. S. 603, 607 (1960); Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 15–16 (1964).

Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional *in toto*—that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad—that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly

construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system.[16] What is clear, however, is that even though a declaratory judgment has "the force and effect of a final judgment," 28 U. S. C. § 2201, it is a

[16] The Senate Report noted that "[t]he declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights." S. Rep. No. 1005, 73d Cong., 2d Sess., 5 (1934). But in my view the federal court's duty to render a declaratory judgment is not the less whatever may be its *res judicata* effect as between the parties to the litigation.

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much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.

The Court's opinion in *Zwickler* v. *Koota* confirmed that the considerations governing the grant of the two remedies are quite different. *Zwickler* v. *Koota* distinguished the prayer for injunction from the prayer for declaratory relief and held squarely that the District Court erred in denying declaratory relief on the ground that there was no "showing . . . of 'special circumstances to justify . . .' injunctive relief." 389 U. S., at 253–254. The Court expressly held that "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court *has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.*" *Id.*, at 254 (emphasis added). See also *Malone* v. *Emmet*, 278 F. Supp. 193 (MD Ala. 1967).

Great Lakes Co. v. *Huffman*, 319 U. S. 293 (1943), is not contrary to my conclusion. That case was an action by employers for a declaration that a state unemployment compensation scheme which imposed a tax upon them was unconstitutional. Congress has always treated judicial interference with the enforcement of tax laws as a subject governed by unique considerations, and this Court has consistently enforced the congressional command that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341. This Court, without relying on the

particular terms of the statute, has taken its underlying policy to require that federal courts stay completely out of the field of anticipatory adjudication of tax cases so long as an adequate remedy is otherwise available. In *Great Lakes* "we held that declaratory relief that a state tax was unconstitutional should be denied by the federal court. The basis of our ruling was that since Congress had prohibited the federal courts from enjoining state taxes where an adequate remedy was available in the state courts, declaratory relief should also be withheld." *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 253 (1952) (DOUGLAS, J., dissenting) (citation omitted). Thus *Great Lakes* adhered to the congressional recognition of the unique considerations presented by anticipatory tax litigation. *Ibid.* As the statutes barring anticipatory relief in federal tax cases, 26 U. S. C. § 7421 (1964 ed., Supp. V); 28 U. S. C. § 2201 (express exception for federal taxes), make entirely clear, the unique considerations that were the basis of *Great Lakes* relate not so much to considerations of federalism as to the peculiar needs of tax administration.[17] Cf. Agricultural Adjustment Act amendments of

[17] "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection." *Bull* v. *United States*, 295 U. S. 247, 259–260 (1935); see also *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146 (1896). In *Phillips* v. *Commissioner*, 283 U. S. 589, 595–596 (1931), Mr. Justice Brandeis said for the Court, "Where . . . adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, the statutory prohibition of any 'suit for the

1935, § 30, 49 Stat. 770, amending Act of May 12, 1933, 48 Stat. 31 (7 U. S. C. § 623 (a)). In contrast, there is no statutory counterpart of 28 U. S. C. § 1341 applicable to intervention in state criminal prosecutions.[18]

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purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights . . . ." (citations omitted). Cf. *Matthews* v. *Rodgers*, 284 U. S. 521, 525–526 (1932). The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess. (1937). These considerations make clear that the underlying policy of the anti-tax-injunction statute, 28 U. S. C. § 1341, relied on in *Great Lakes*, bars all anticipatory federal adjudication in this field, not merely federal injunctions. Very different considerations apply in the context of state criminal statutes challenged as unconstitutional. At issue on one side are fundamental personal rights, not property rights. At risk on the other is not the current financing of state government, but the future enforcement of a particular criminal statute.

[18] Title 28 U. S. C. § 2283 is certainly not analogous to the prohibition of federal anticipatory relief in tax cases. That statute applies only where there is a pending state proceeding, *Dombrowski* v. *Pfister*, 380 U. S., at 484 n. 2, whereas the present discussion concerns the propriety of federal relief where no state proceeding is pending. Moreover, unlike the tax statutes, § 2283 is not directed to any particular class of litigation, criminal or otherwise, but is designed to protect the process of orderly state court adjudication gen-

Of course, the grant or denial of a declaratory judgment is a matter of sound judicial discretion. The standards for the exercise of this discretion have been articulated in *Aetna Life Ins. Co.* v. *Haworth, supra; Public Service Comm'n of Utah* v. *Wycoff Co., supra,* and in *Zwickler* v. *Koota, supra;* see *supra,* at 120–126. Where a federal court is asked to declare the validity or invalidity of a state statute, this discretion is to be exercised "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to

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erally. When Congress has wanted to protect particular categories of state business from anticipatory federal intervention, it has known how to say so. See 28 U. S. C. §§ 1341, 1342. No such statute applies to state criminal law administration. Finally, the Federal Declaratory Judgment Act plainly evinces a congressional intent that the statutory term "injunction" in § 2283 not be read to include declaratory judgments. An analogous question was before us recently in *Mitchell* v. *Donovan,* 398 U. S. 427 (1970). There we were called on to decide whether an order of a three-judge court granting or denying a declaratory judgment may be appealed to this Court under 28 U. S. C. § 1253, which provides that with certain exceptions "any party may appeal to the Supreme Court from an order granting or denying . . . an . . . *injunction* in any civil action . . . required . . . to be . . . determined by a district court of three judges." (Emphasis added.) The direct-appeal provision of § 1253 obviously reflects the particular sensitivity of granting or denying an injunction in those important cases required to be heard by three-judge courts. See generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964). The Court clearly had those considerations in mind when it observed, "While there are similarities between injunctions and declaratory judgments, there are also important differences. . . . [T]his Court's jurisdiction under [§ 1253] is to be literally construed. . . . It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'" 398 U. S., at 430–431.

guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S. 241, 251 (1886). However, as the Court said in *Zwickler* v. *Koota:*

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,' *Robb* v. *Connolly*, 111 U. S. 624, 637. . . . The judge-made doctrine of abstention, first fashioned in 1941 . . . sanctions such escape only in narrowly limited 'special circumstances.' *Propper* v. *Clark*, 337 U. S. 472, 492." 389 U. S., at 248.

Thus, where no criminal prosecution involving the federal court parties is pending when federal jurisdiction attaches, declaratory relief determining the disputed constitutional issue will ordinarily be appropriate to carry out the purposes of the Federal Declaratory Judgment Act and to vindicate the great protections of the Constitution.

I conclude that the three-judge court properly exercised its discretion in issuing a declaratory judgment upon the constitutionality of St. Bernard Parish Ordinance No. 21–60. I also agree with the District Court that the ordinance is unconstitutional on its face because "mortally infected with the vice of vagueness." 304 F. Supp., at 670. Appellants do not assert the contrary.

Paragraphs 1 and 2 of the judgment entered August 14, 1969, should be reversed and the judgment in all other respects should be affirmed.

APPENDIX TO OPINION OF BRENNAN, J.

LOUISIANA REVISED STATUTES ANNOTATED

§ 14:106. Obscenity

A. Obscenity is the intentional:

(1) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(5) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(6) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(7) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

B. In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

When a violation of Paragraphs (1), (2), (3), and (4) of Subsection (A) of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

Amended by Acts 1958, No. 388, § 1; Acts 1960, No. 199, § 1; Acts 1962, No. 87, § 1; Acts 1968, No. 647, § 1, emerg. eff. July 20, 1968, at 1:30 P.M.

POLICE JURY
ST. BERNARD PARISH
ST. BERNARD COURTHOUSE ANNEX
CHALMETTE, LOUISIANA

EXTRACT OF THE OFFICIAL PROCEEDINGS OF THE POLICE JURY OF THE PARISH OF ST. BERNARD, STATE OF LOUISIANA, TAKEN AT THE REGULAR MEETING HELD IN THE POLICE JURY ROOM OF THE COURTHOUSE ANNEX, AT CHALMETTE, LOUISIANA, ON NOVEMBER 2, 1960, AT ELEVEN O'CLOCK (11:00) A. M.

On motion of Celestine Melerine, seconded by Joseph V. Papania and upon recommendation of the District Attorney of the Parish of St. Bernard, the following Ordinance was adopted:

ORDINANCE NO. 21-60

An Ordinance known as the Ordinance of St. Bernard Parish, relative to prohibiting and defining the offense of obscenity and indecent literature, adding thereto the offense of "attempt," and prescribing penalties for the violation thereof.

SECTION 1.

Offense of obscenity defined and prohibited.

SECTION 2.

BE IT ORDAINED, by the Police Jury of the Parish of St. Bernard that obscenity is prohibited and is hereby defined as the intentional.

SECTION 3.

BE IT FURTHER ORDAINED, that public personal exposure of the female breast or the sexual organs or fundament of any person of either sex.

SECTION 4.

BE IT FURTHER ORDAINED, that production, sale, exhibition, possession with intent to display, or distribution of any obscene, lewd, lascivious, prurient or sexually indecent print, advertisement, picture, photograph, written or printed composition, model, statue, instrument, motion picture, drawing, phonograph recording, tape or wire recording, or device or material of any kind.

SECTION 5 (a)

BE IT FURTHER ORDAINED that the performance of any dance, song, or act in any public place, or in any public manner representing or portraying or reasonably calculated to represent or portray any act of sexual intercourse between male and female persons, or any act of perverse sexual intercourse or contact, or unnatural carnal copulation, between persons of any sex, or between persons and animals.

SECTION 5 (b)

OR FURTHER, the performance in any public place, or any public manner of any obscene, lewd, lustful, lascivious, prurient or sexually indecent dance, or the rendition of any obscene, lewd, lustful, lascivious, prurient or sexually indecent song or recitation.

SECTION 6.

BE IT FURTHER ORDAINED, PRODUCTION, POSSESSION WITH INTENT to display, exhibition, distribution, or sale of any literature as defined herein containing one or more pictures of nude or semi-nude

female persons, wherein the female breast or any sexual organ is shown or exhibited, and where, because of the number or manner of portrayal in which such pictures are displayed in such literature, they are designed to appeal predominantly to the prurient interest.

SECTION 7.

BE IT FURTHER ORDAINED, that it shall also be unlawful for any person to attempt to commit any of the violations set forth in this section.

SECTION 8.

BE IT FURTHER ORDAINED, that any person upon conviction of a violation of this section shall be sentenced to serve not more than ninety (90) days, or pay a fine of not more than one hundred dollars ($100.00) or both, in the discretion of the Court.

BE IT FURTHER ORDAINED, that persons convicted of an attempt to violate this section shall be sentenced to not more than one-half of the maximum penalty prescribed, or pay not more than half of the maximum fine or both, as set forth above.

SECTION 9.

BE IT FURTHER ORDAINED, that the word literature as used herein means and includes a book, booklet, pamphlet, leaflet, brochure, circular, folder, handbill or magazine. The word picture as used herein means and includes any photograph, lithograph, drawing, sketch, abstract, poster, painting, figure, image, silhouette, representation or facsimile.

SECTION 10.

BE IT FURTHER ORDAINED, that this Ordinance shall be published in the Official Journal of the Parish, the St. Bernard Voice.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: Henry C. Schindler, Jr., Joseph V. Papania, Peter N. Huff, Peter Perniciaro, Louis P. Munster, John W. Booth, Sr., Claude S. Mumphrey, Celestine Melerine, Edward L. Jeanfreau, and Mrs. Blanche Molero.

NAYS: None.

ABSENT: None.

And the Ordinance was declared adopted on this, the 2nd day of November, 1960.

/s/ VALENTINE RIESS,
(Valentine Riess),
President.

/s/ JOSEPH E. SORCI,
(Joseph E. Sorci),
Secretary.

CERTIFICATE

I CERTIFY THAT the above and foregoing is a true and correct copy of an ordinance adopted by the St. Bernard Parish Police Jury at a Regular meeting held at Chalmette, Louisiana, in the Police Jury Room at the Courthouse Annex on the 2nd day of November, 1960.

Witness my hand and the Seal of the St. Bernard Parish Police Jury this 11th day of February, 1969.

/s/ R. M. McDOUGALL,
(R. M. McDougall),
Secretary.

Syllabus

MAGNESIUM CASTING CO. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 370. Argued January 18–19, 1971—Decided February 23, 1971

Following a unit determination hearing, the National Labor Relations Board (NLRB) regional director concluded that three individuals were employees rather than supervisors and thus includible in the proposed bargaining unit at petitioner company's plant. The NLRB denied petitioner's request for review. Following an election, the regional director certified the union as the exclusive bargaining representative. Subsequently, the NLRB upheld a finding that petitioner's refusal to bargain constituted an unfair labor practice. Petitioner moved for reconsideration on the ground that the NLRB was required to give plenary review to the regional director's representation determination before issuing an unfair labor practice order based on that determination. The motion was denied and the Court of Appeals enforced the NLRB's order. *Held:* Under § 3 (b) of the National Labor Relations Act the NLRB is permitted to delegate to the regional director its authority to determine the appropriate bargaining unit, and plenary review by the NLRB of such determination is not mandatory. Pp. 141–143.

427 F. 2d 114, affirmed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

Louis Chandler argued the cause for petitioner. With him on the brief was *Jerome H. Somers.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General Griswold, Wm. Terry Bray, Arnold Ordman,* and *Dominick L. Manoli.*

Briefs of *amici curiae* urging reversal were filed by *Jerry Kronenberg* and *Alan Raywid* for the Terminal Freight Cooperative Association, and by *William L. Dennis* for Olson Bodies, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman,* and *George H. Cohen* for the United Steelworkers of America, AFL–CIO, and by *Benjamin Rubenstein* for International Union, U. A. W.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 3 (b) of the National Labor Relations Act, as amended, 61 Stat. 139, 73 Stat. 542, 29 U. S. C. § 153 (b), authorizes the National Labor Relations Board to delegate to its regional directors the power to determine the unit appropriate for collective bargaining.[1] The Board accordingly adopted rules delegating to its regional directors its powers to determine representation issues and defining the conditions when the Board will review the determination of a regional director.[2]

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[1] Sec. 3 (b) provides in relevant part:

"The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . ."

[2] The rules are contained in 29 CFR § 102.67. Subsections 102.67 (c), (d), and (f) state in relevant part:

"(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual

On filing of a representation petition, § 9 (c)(1) provides that a hearing shall be held to determine if a question of representation exists and, if so, the appropriate bargaining unit. If an election is directed and the union prevails, it is certified as the employees' bargaining representative. An employer who contests the election, including the unit determination, can only obtain court review under § 10 after an unfair labor practice charge has been made against him by the Board for refusing to bargain collectively "with the representatives of his employees" as provided in § 8 (a)(5).

In that review, however, the determination of the bargaining unit by the regional director need not be reviewed by the Board. Whether the Board reviews the initial decision on the merits, see *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 162, or the employer fails to request review of the action of the regional director, or the Board denies a request for review, the Board has

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issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

"(d) . . . With respect to paragraph (c)(2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director."

"(f) . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

discretion to reopen the issue where newly discovered noncumulative evidence is available.[3]

The United Steelworkers filed a petition requesting a representation election among the production and maintenance employees at petitioner's Hyde Park, Massachusetts, plant. The regional director provided a hearing and the essential issues tendered concerned four individuals classified as "assistant foremen." The question was whether they were employees and properly within the unit or supervisors as defined in § 2 (11) of the Act and therefore excluded. The regional director found that three were employees and ordered an election in a unit consisting of all the employees, including the three.

Petitioner filed a request with the Board to review the decision of the regional director that the three men in question were employees, contending that such determination was clearly erroneous. The Board denied petitioner's request for review and an election was held. Thereafter the regional director certified the union as the exclusive bargaining representative of the employees. When petitioner refused to bargain, the union filed an unfair labor practice charge with the Board. The trial examiner found for the union and the Board affirmed. 175 N. L. R. B. No. 68.

Petitioner moved for reconsideration claiming the Board must review the regional director's representation determination before issuing an unfair labor practice order based on it. Petitioner's reliance was on *Pepsi-Cola Co.* v. *NLRB*, 409 F. 2d 676, decided by the Court of Appeals for the Second Circuit. The Board denied that motion, noting its disagreement with the *Pepsi-Cola* case.

The Court of Appeals enforced the Board's order,[4]

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[3] See rules, *supra*, n. 2.

[4] The Tenth Circuit is in accord with the First. See *Meyer Dairy, Inc.* v. *NLRB*, 429 F. 2d 697, 699–700.

427 F. 2d 114, thus creating the conflict among the circuits which led us to grant the petition for certiorari. 400 U. S. 818.

Petitioner argues that plenary review by the Board of the regional director's unit determination is necessary at some point. Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding. We so held in *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* That case, of course, was decided when the determination of the appropriate unit was made by the Board itself. In 1959, § 3 (b) was added. Senator Goldwater, a member of the Conference Committee explained its purpose: [5]

> "[Section 3 (b)] is a new provision, not in either the House or Senate bills, designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.
>
> "Under this provision, the regional directors can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the regional directors are required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act.
>
> . . . . . .
>
> "This authority to delegate to the regional directors is designed, as indicated, to speed the work of the Board. . . ."

We take this statement to reflect the considered judgment of Congress that the regional directors have an expertise concerning unit determinations. Or perhaps

[5] 105 Cong. Rec. 19770.

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Congress was primarily motivated by a desire to lighten the Board's workload and speed up its processes. Its recent report [6] shows that in fiscal year 1969, a total of 1,999 formal representation decisions were issued either directing elections or dismissing election petitions; 1,872 of these were rendered by regional directors, and 127 by the Board (100 on direct transfer from the regional directors for initial decision and 27 on grant of a request for review of the regional director's decision).

But for the 1959 amendment the Board would have decided all of those cases.

Whatever the reason for the delegation, Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.

The fact that Congress in 1961 rejected a reorganization plan which would have delegated decisionmaking power in unfair labor practice cases to the hands of trial examiners subject to discretionary Board review [7] has no bearing on the present problem. The choices Congress may make in deciding what delegation of authority is appropriate do not in the present context raise any semblance of a substantial question. For it is unmistakably plain here that by § 3 (b) Congress did allow the Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director.

The Board's rules [8] make clear that the regional director is required to follow the same rules as the Board respecting factfinding.[9] The regional director's deter-

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[6] 34th Annual Report, Table 3B, 201 (1970).

[7] 107 Cong. Rec. 10223, 12905–12932.

[8] See rules, *supra*, n. 2.

[9] 29 CFR § 102.67 (b).

mination if adopted by the trial examiner in the unfair labor practice proceeding accompanies the case both to the Board [10] and to the Court of Appeals.[11] In the present case the Court of Appeals concluded that the Board's order was supported "by substantial evidence." [12]

Congress has required no greater showing than that.

Affirmed.

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[10] 29 CFR § 102.45 (a).

[11] 29 CFR § 101.14.

[12] There is no different standard of review prescribed by the Administrative Procedure Act. 5 U. S. C. § 706 (1964 ed., Supp. V). See *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 487.

SANKS ET AL. *v.* GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 28. Argued December 8, 1969—Reargued November 17–18, 1970—Decided February 23, 1971

As a condition precedent to making a defense against a summary eviction proceeding, Georgia law provided that the tenant post a surety bond for double the amount due at the end of the trial, the landlord becoming entitled to such double rent should the tenant lose his case. Following the Georgia Supreme Court's upholding of that statutory scheme over due process and equal protection challenges by appellants, indigent tenants seeking to contest summary eviction, appellants left the premises their landlords initially sought to recover, and entirely new legislation was enacted containing neither the bond-posting nor double-rent requirement. *Held:* These ensuing developments make it inappropriate for this Court to resolve the issues originally raised by appellants since it cannot be determined to what extent adjudication of those issues would be material to any further litigation ensuing on remand. Pp. 147–153.

225 Ga. 88, 166 S. E. 2d 19, appeal dismissed and remanded.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment, *post*, p. 153.

Michael D. Padnos reargued the cause for appellants. With him on the brief were *Nancy S. Cheves* and *John William Brent.*

Alfred L. Evans, Jr., Assistant Attorney General of Georgia, reargued the cause for appellees. With him on the brief were *Arthur K. Bolton*, Attorney General, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *A. Joseph Nardone, Jr.*, Assistant Attorney General.

Frank B. Zeigler filed a brief for the Legal Aid Office of Savannah, Inc., as *amicus curiae* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We noted probable jurisdiction in this case, 395 U. S. 974 (1969), because the judgment of the Georgia Supreme Court appeared to raise substantial questions under the Fourteenth Amendment that were deserving of our plenary consideration, and because whatever conclusion this Court might reach with respect to them would definitively settle this aspect of the litigation. In brief, the Georgia Supreme Court upheld, over due process and equal protection challenges, a state statutory scheme that compelled appellants, both indigent persons who sought to contest landlord petitions for summary eviction from their homes, to post, as a condition precedent to offering any defense to summary eviction, a surety bond in double the potential amount of rent due at the end of trial. The statutes, this aspect of which was also upheld by the Georgia Supreme Court, provided further that the landlords would become entitled to such double rent should the tenant-appellants lose their cases.

The case was first heard by us at the 1969 Term, and was thereafter set for reargument at the present Term. 399 U. S. 922 (1970). At reargument it became apparent that events occurring subsequent to our notation of probable jurisdiction had so drastically undermined the premises on which we originally set this case for plenary consideration as to lead us to conclude that, with due regard for the proper functioning of this Court, we should not now adjudicate it.

I

The Georgia statutory scheme under which this case was initiated, Ga. Code Ann. §§ 61–301 to 61–305 (1966), and § 61–306 (Supp. 1969), operated in the following manner. A landlord seeking summary eviction could file an affidavit in a local court, alleging that the tenant,

for one or more statutorily enumerated reasons, was unlawfully holding possession of the premises and had refused the landlord's demand to relinquish possession. (§ 61–301.) When such an affidavit had been filed the local judicial officer was required to issue a "warrant or process" to the sheriff directing him to "deliver to the owner" the premises described in the affidavit. (§ 61–302.) The sheriff was to give the tenant four days' notice before executing the dispossessory warrant. (§ 61–306 (Supp. 1969).)

The tenant could prevent immediate eviction only by filing a counter-affidavit, alleging one of several specified defenses and accompanied by a surety bond "for the payment of such sum, with costs, as may be recovered against him on the trial of the case." (§ 61–303.) Only if the tenant followed these procedures was he then entitled to a trial on the issues raised by the affidavits. (§ 61–304.) Against this background, § 61–305 provided:

> "If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth . . . ."

In the case before us, appellants Sanks and Momman were served with dispossessory warrants on May 21, 1968, and July 17, 1968, respectively (App. 3, 18), and then applied for (App. 5, 20), and eventually obtained (App. 24–39) from the Civil Court of Fulton County a "rule nisi" permitting appellants to remain in possession of their respective premises pending resolution of the factual issues raised by their applications, so long as they timely paid their rent into court during the pendency of the litigation. Both the bond-posting

requirement (§ 61–303) and the double-rent damages measure (§ 61–305) were declared unconstitutional and, hence, inapplicable to these eviction proceedings. (App. 27–39.) On an interlocutory appeal, the trial court's constitutional declarations were set aside by the Supreme Court of Georgia, 225 Ga. 88, 166 S. E. 2d 19 (1969), and the judgment of the lower court was reversed.

II

Since we noted probable jurisdiction the posture of this case has shifted dramatically. Both Mrs. Momman and Mrs. Sanks have removed from the premises originally sought to be recovered by their landlords. In addition, the Georgia General Assembly has repealed virtually the entire statutory scheme that has governed this litigation from its inception and replaced it with a new one, effective July 1, 1970, that contains neither the bond-posting nor double-rent requirement. 1 Ga. Laws 1970, pp. 968–972, Ga. Code Ann. §§ 61–302 to 61–305 (Supp. 1970). Under the new law, dispossessory actions will still be commenced by the landlord's execution of an affidavit. Now, however, this merely compels the local judicial officer to cause the tenant to be summoned to a hearing (§ 61–302), and the tenant can retain possession and force a trial of any defenses he may wish to raise simply by answering the affidavit, orally or in writing, at the hearing. (§ 61–303.) Expedited trials are encouraged. If the litigation has not been concluded within a month of the execution of the landlord's affidavit, the tenant may retain possession by paying into court all rent as it becomes due, in addition to any rent that was due but not paid prior to issuance of the summons. (§§ 61–303, 61–304.) If the landlord ultimately prevails, his monetary damages, if any, are to be based on the actual, not double, rent found due. (§ 61–305.) Similarly, the tenant may, in effect, stay execu-

tion of the dispossessory warrant pending appeal of an adverse determination simply by paying rent, as it accrues, into the court. (§ 61–306.)

III

The crux of this controversy from its inception has been appellants' insistence that they, not their alleged landlords, had the right to lawful possession of the premises in dispute and their demands that they be permitted to remain in possession pending the outcome of the litigation.[1] With appellants' voluntary removal from the premises this aspect of the case is clearly moot. We have been apprised of no basis in the statutes or case law for assuming that were this Court now to hold Mrs. Sanks and Mrs. Momman were constitutionally entitled to proceed in the trial court without first posting a double-rent bond, they could then seek a decree under the statutes here at issue returning them to possession of the premises. The repealed statute spoke only of enabling a tenant already in possession to contest forcible eviction upon posting a bond. Indeed, neither appellants nor appellees—all of whom resist the suggestion that the case as a whole is moot—contend that this aspect of it is not moot. There is thus no reason to believe that, on remand, either appellant, if successful in this Court, could litigate, in the context of any proceeding that might conceivably be governed by any of the provisions of these repealed Georgia statutes, a claim to be put in possession of the premises she originally occupied.

In support of the continued justiciability of the case, appellants rely upon a subsidiary aspect of this controversy which they claim remains alive. Were this

[1] Mrs. Sanks intended to contest the dispossessory warrant on the ground that she is not, in fact, the tenant of the person seeking to evict her. App. 5.

Court to affirm the Georgia Supreme Court on the merits, the case would presumably be remanded to the trial court in accordance with the Georgia Supreme Court's mandate. There, argue appellants, those who initially procured the dispossessory warrants might then move for entry of a judgment for double damages as provided in former § 61–305. Appellants fear that such a judgment might automatically be entered because their removal from the premises might be construed as effectively conceding their lack of substantive defenses or that, even if they are still technically entitled to raise defenses, appellants' ability to do so will be conditioned on first posting the bond. Such a result is possible only if a number of factors coalesce. First, the original moving parties, the alleged lessors, would have to decide to seek such damages from these relatively impecunious appellants. Second, the Georgia courts would have to rule that such request for damages should be adjudicated under the repealed statutes. Third, it would also be necessary for the state courts to hold that those statutes contemplated awarding double rent in the circumstances here and (see *infra*) on a basis that renders material the bond-posting provision.

Beyond all this, the original posture of this case has been further upset by the apparent fact that prior to moving out, and in compliance with the order of the trial court, appellants paid their rent money into the court's registry as it became due, money that still remains on deposit there. Tr. of Oral Rearg., Nov. 18, 1970, pp. 10–11, 26.

With the case in this Court thus so reoriented, it is impossible for us to predict whether and to what extent our adjudication of the issues originally presented would now be material to any further litigation that might ensue on remand. Whether the original initiating parties will seek double damages is a matter wholly beyond

the control of this, or any other, court. Whether the existence of funds in the registry of the trial court will necessitate an adversary proceeding to redistribute them and, if so, whether that proceeding would be governed by the repealed statutes which, on their face, do not even remotely speak to this problem, are matters of pure conjecture. Because the former statutes provided for double damages only where "the issue . . . [is] determined against the tenant" (former § 61–305) and provided for joinder of issue only where a double-rent bond had first been posted (former §§ 61–303, 61–304), we are quite unable to say whether the Georgia courts would nevertheless hold this language sufficiently elastic to permit a claim for double damages where eviction was arrested by court order rather than a bond, yet insufficiently flexible to permit simultaneous waiver of the bond-posting requirement before adjudication of such a claim. Nor can we predict whether and to what extent repeal of the former statutory scheme would, on remand, be held to alter any of the conclusions respecting it which the Georgia courts might otherwise adopt in this context.[2] All these issues, so far as it appears, would be matters of first impression for the Georgia judiciary.

IV

Given this imponderable legal tangle, involving, as it does, purely matters of state law, we perceive no other responsible course for this Court than to decline, at this stage, to adjudicate the issues originally presented. We

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[2] Georgia has a statutory policy disapproving the retroactive application of new statutes. Ga. Code Ann. § 102–104 (1968). However, the statute expressly distinguishes "[l]aws looking only to the remedy or mode of trial." Conceivably, this case might be held to fall within that exception. Moreover, we cannot foretell whether a subsequent motion for double damages would be treated as, in effect, a new lawsuit filed well after passage of the new Act.

do not rest this conclusion on a determination that the case is moot. Conceivably, appellants may on remand be subjected to the double-rent or bond-posting requirements of the former statutes. But it has always been a matter of fundamental principle with this Court, a principle dictated by our very institutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity. As said in *United States* v. *Petrillo,* 332 U. S. 1, 5 (1947), "We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity." Manifestly, it cannot plausibly be maintained that this is such a case. Indeed, the only thing that is now apparent about this lawsuit is that the clear-cut constitutional issues it formerly presented cannot with any certainty be said to be relevant to the issues remaining in it, if, in fact, any issues do remain.

Moreover, even were the constitutional issues certain to arise below we cannot foretell the context in which they will appear. Possibly the double-rent provision will be successfully invoked, but not the bond-posting requirement. Similarly, if the latter is held applicable, we would at this stage be required to adjudicate, in advance of that fact, its validity as a precondition not to resisting summary eviction, which is its normal and clearly intended use, but to contesting a claim for damages only. The operative competing constitutional considerations, particularly the nature and scope of the State's interest in imposing such a barrier to litigation, may well be significantly different depending on the principal purposes for which the bond is required. Yet, given the debilitated state of this lawsuit, we could address only the subsidiary problem—and this in a legal context where we would not know whether that problem will ever arise.

The principle of prudent restraint we invoke today is

nothing new, although, happily, it has not frequently proved necessary to dispose of appeals on this basis. *United States* v. *Fruehauf*, 365 U. S. 146 (1961), provides an apt analogy. There the United States had appealed the dismissal of an indictment brought under § 302 (a) of the Taft-Hartley Act, 61 Stat. 157, which made it unlawful "for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees," where the lower court had construed a Government pretrial memorandum as a concession that the transaction forming the basis of the indictment was a loan and held that the statute did not penalize management for loaning money to union officials. This Court noted probable jurisdiction to consider the validity of this construction of the statute, but after oral argument the Solicitor General represented to the Court that he felt the Government was free, on remand, to prove the transaction came within the statute because its particular facts revealed this was not a bona fide loan. This occurrence left the precise issue to be decided so opaque and the extent to which a decision would resolve the controversy so uncertain that the Court, in effect, was being asked to render an "advance expression of legal judgment upon issues which remain unfocused," 365 U. S., at 157. Accordingly, the Court remanded the case without further adjudication.

In the case now before us subsequent events have produced similar consequences. The focus of this lawsuit has been completely blurred, if not altogether obliterated, and our judgment on the important issues involved is potentially immaterial. Indeed, the instant case is obviously more compelling than *Fruehauf*, since this one presents an issue of constitutional, not statutory, interpretation.

Similarly, in *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549 (1947), the Court declined to adjudicate an appeal presenting important constitutional issues because those issues were, on close inspection, so intertwined with complex problems of construing the Los Angeles Municipal Code that it was not possible to tell with precision at that stage in what context and to what extent the appellants' freedom was being restrained. So, here, we do not know, assuming the bond-posting or double-damages provisions ultimately are successfully invoked, in what context this will occur, or what the precise rationale for applying them will be.

In short, resolution by this Court at this time, of the issues originally raised by appellants would not be appropriate. We leave ourselves completely free, of course, to review these issues should appellants' fears that they will be adversely affected by the repealed statutes subsequently be confirmed by proceedings in the Georgia courts.

Accordingly, the appeal will be dismissed and the case remanded to the Supreme Court of Georgia.

It is so ordered.

MR. JUSTICE BLACK concurs in the judgment of the Court dismissing this appeal but does so specifically on the ground that the case is now moot.

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL. *v.* WADMOND ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 49. Argued October 15, 1970—Decided February 23, 1971

Appellants challenge, primarily on First Amendment vagueness and overbreadth grounds, the system for screening applicants for admission to the New York Bar. To carry out the statutory requirement that the Appellate Division of the State Supreme Court "be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law," Committees on Character and Fitness receive affidavits from two persons (one of whom must be a practicing attorney) acquainted with the applicant, and a questionnaire completed by the applicant. The Committees also conduct personal interviews with each applicant. As the final step before admission to the Bar, the applicant must take an oath that he will support the United States and New York Constitutions. Appellants attack the procedure, not because any applicant has ever been unjustifiably denied permission to practice law in New York, but on the basis that it works a "chilling effect" upon the exercise of free speech and association of law students. The three-judge District Court found certain items on the questionnaire so vague, overbroad, and intrusive on applicants' privacy as to be of doubtful constitutional validity, but upheld the statute and rules as valid on their face, and with the exceptions noted, sustained the validity of the procedure. *Held:*

1. The "character and general fitness" requirement for admission to the New York Bar is not violative of the Constitution. Pp. 159–160.

(a) The requirement has been construed by appellees to encompass no more than "dishonorable conduct relevant to the legal profession." P. 159.

(b) The current third-party affidavits, setting forth the nature and extent of affiants' acquaintance with the applicant, do not infringe upon the applicant's right to privacy. P. 160.

2. New York's Rule that an applicant furnish proof that he "believes in the form of government of the United States and is loyal to such government," is not constitutionally invalid in light of appellees' construction that the Rule places no burden of proof on the applicant, that the "form of government" and the "government" refer solely to the Constitution, and that "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith. Pp. 161–164.

3. The challenged items on the modified questionnaire are not constitutionally invalid, as one is precisely tailored to conform to this Court's decisions on organizational membership and association, and the other is merely supportive of appellees' task of ascertaining the applicant's good faith in taking the constitutional oath. Pp. 164–166.

4. New York's carefully administered screening system does not necessarily result in chilling the exercise of constitutional freedoms, and whether a different policy might be wiser rests with that State's policy-making bodies. P. 167.

299 F. Supp. 117, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion, *ante*, p. 34. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 174. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 185.

Norman Dorsen argued the cause for appellants. On the brief for appellants Law Students Civil Rights Research Council, Inc. et al. were *Alan H. Levine*, *Jeremiah S. Gutman*, *Melvin L. Wulf*, and *Sanford Jay Rosen*. On the brief for appellants Wexler et al. were *Leonard B. Boudin*, *Victor Rabinowitz*, and *David Rosenberg*.

David W. Peck argued the cause for appellees. With him on the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Daniel M. Cohen*, Assistant Attorney General, and *Michael M. Maney*.

MR. JUSTICE STEWART delivered the opinion of the Court.

An applicant for admission to the Bar of New York must be a citizen of the United States, have lived in the State for at least six months, and pass a written examination conducted by the State Board of Law Examiners. In addition, New York requires that the Appellate Division of the State Supreme Court in the judicial department where an applicant resides must "be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law." New York Judiciary Law § 90, subd. 1, par. a (1968).[1] To carry out this provision, the New York Civil Practice Law and Rules require the appointment, in each of the four Judicial Departments into which the Supreme Court is divided, of a Committee or Committees on Character and Fitness.[2] Section 528.1 of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counsellors-at-Law requires that the character and general fitness specified in Judiciary Law § 90 "must be shown by the affidavits of two reputable persons residing in the city or county in which [the applicant] resides, one of whom must be a practicing attorney of the Supreme Court of this State."[3] The Committees also re-

[1] The New York statute, rules, and affidavit forms relevant to the issues in this litigation are set out in the Appendix to this opinion.

[2] N. Y. Civ. Prac. Law and Rules, Rule 9401 (1963); see also *id.*, Rule 9404.

These Rules, originally enacted by the State Legislature, may be amended either by the legislature or by the New York Judicial Conference. N. Y. Judiciary Law § 229, subd. 3 (1968); N. Y. Civ. Prac. Law and Rules, Rule 102 (1963).

[3] N. Y. Judiciary Law Appendix § 528.1 (Supp. 1970). This section, recently renumbered with no change in its wording, is referred to throughout the briefs and earlier opinions as Rule VIII of the New York Court of Appeals.

quire the applicant himself to fill out a questionnaire.[4] After receipt of the affidavits and questionnaire, the Committees conduct a personal interview with each applicant. As a final step before actual admission to the Bar, an applicant must take an oath that he will support the Constitutions of the United States and of the State of New York.[5]

This case involves a broad attack, primarily on First Amendment vagueness and overbreadth grounds, upon this system for screening applicants for admission to the New York Bar. The appellants, plaintiffs in the trial court, are organizations and individuals claiming to represent a class of law students and law graduates similarly situated, seeking or planning to seek admission to practice law in New York. They commenced two separate actions for declaratory and injunctive relief in the United States District Court for the Southern District of New York, naming as defendants two Committees on Character and Fitness and their members and two Appellate Divisions and their judges.[6] The complaints attacked the statutes, rules, and screening procedures as invalid on their face or as applied in the First and Second Departments. A three-judge court was convened and consolidated the two suits.

In a thorough opinion, the court considered the appellants' claims and found certain items on the questionnaires as they then stood to be so vague, overbroad, and intrusive upon applicants' private lives as to be of doubtful constitutional validity.[7] It granted the partial

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[4] Answers to these questionnaires are treated as confidential.

[5] N. Y. Judiciary Law § 466 (1968); N. Y. Const., Art. XIII, § 1.

[6] The suits were brought under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983.

[7] 299 F. Supp. 117. The appellees had already, both before and after the commencement of this litigation, eliminated or revised

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relief indicated by these findings, approving or further amending the revised questions submitted by the appellees to conform to its opinion.[8] It upheld the statutes and rules as valid on their face and, with the exceptions noted, sustained the validity of New York's system. This appeal followed, and we noted probable jurisdiction. 396 U. S. 999.[9]

We note at the outset that no person involved in this case has been refused admission to the New York Bar. Indeed, the appellants point to no case in which they claim any applicant has ever been unjustifiably denied permission to practice law in New York State under these or earlier statutes, rules, or procedures. The basic thrust of the appellants' attack is, rather, that New

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certain questions to which the appellants had originally raised objections. See *id.*, at 129 and n. 6.

[8] No cross-appeal has been taken from this partial grant of the requested injunction. We therefore have no occasion to consider whether the District Court's action was correct.

[9] Our jurisdiction of this appeal rests on 28 U. S. C. § 1253, the three-judge panel having been properly convened since the suits attacked state statutes as violative of the Federal Constitution and requested injunctive relief, 28 U. S. C. § 2281, which the District Court partially denied.

The appellees are the Committees on Character and Fitness of the First and Second Departments; their individual members; the First and Second Departments of the Appellate Division of the Supreme Court of the State of New York; and their individual justices. The appellees contend, as they did below, that the state courts and their justices are not within the jurisdiction of the federal courts because they are not "persons" within the meaning of 42 U. S. C. § 1983. The District Court rejected this argument, reasoning that the courts and the justices were acting in an administrative capacity and that an injunction here could have no inhibiting effect on the proper performance of judicial duties. 299 F. Supp., at 123–124. The appellees took no cross-appeal and did not press the point in their motion to affirm. We therefore pursue the matter no further.

York's system by its very existence works a "chilling effect" upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements.

I

The three-judge District Court, although divided on other questions, was unanimous in finding no constitutional infirmity in New York's statutory requirement that applicants for admission to its Bar must possess "the character and general fitness requisite for an attorney and counsellor-at-law." [10] We have no difficulty in affirming this holding. See *Konigsberg* v. *State Bar*, 366 U. S. 36, 40–41; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 247 (Frankfurter, J., concurring). Long usage in New York and elsewhere has given well-defined contours to this requirement, which the appellees have construed narrowly as encompassing no more than "dishonorable conduct relevant to the legal profession," see 299 F. Supp., at 144 n. 20 (separate opinion of Motley, J.); see also *Schware* v. *Board of Bar Examiners, supra*, at 247 (Frankfurter, J., concurring). The few reported cases in which bar admission has been denied on character grounds in New York all appear to have involved instances of misconduct clearly inconsistent with the standards of a lawyer's calling.[11]

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[10] 299 F. Supp., at 124–125 (majority opinion of Friendly, J.); *id.*, at 143–144 (separate opinion of Motley, J.).

[11] See, *e. g.*, *Matter of Cassidy*, 268 App. Div. 282, 51 N. Y. S. 2d 202, aff'd *per curiam*, 296 N. Y. 926, 73 N. E. 2d 41; *Matter of Portnow*, 253 App. Div. 395, 2 N. Y. S. 2d 553; *Matter of Greenblatt*, 253 App. Div. 391, 2 N. Y. S. 2d 569; *Matter of Peters*, 221 App. Div. 607, 225 N. Y. S. 144, aff'd *per curiam*, 250 N. Y. 595, 166 N. E. 337; cf. *Matter of Anonymous*, 17 N. Y. 2d 674, 216 N. E. 2d 612.

Cf. also *In re Stolar*, *ante*, p. 23, in which it appears that the petitioner there had previously been admitted to the New York Bar

This Court itself requires of applicants for admission to practice before it that "their private and professional characters shall appear to be good." [12] Every State, plus the District of Columbia, Puerto Rico, and the Virgin Islands, requires some similar qualification.[13]

But, the appellants contend, even though the statutory standard may be constitutionally valid, the methods used by the Committees to satisfy themselves that applicants meet that standard are not. Specifically, the appellants object to the terms of the third-party affidavits attesting to an applicant's good moral character. During this litigation, the appellees revised the affidavit forms in several respects. Whatever may have been said of the affidavits formerly used, we can find nothing in the present forms remotely vulnerable to constitutional attack. In the Second Department, for example, an affiant is asked to state whether he has visited the applicant's home and, if so, how often. We think it borders on the frivolous to say that such an inquiry offends the applicant's "right to privacy protected by the First, Fourth, Ninth, and Fourteenth Amendments." It is the applicant who selects the two people who will sign affidavits on his behalf, and the Committees may reasonably inquire as to the nature and extent of an affiant's actual acquaintance with the applicant.[14]

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under the standards in use before the commencement of this litigation. There is, moreover, no indication that either Charles Evans Hughes or John W. Davis, despite the fears reflected in MR. JUSTICE BLACK's dissenting opinion, *post*, at 180–181, encountered any difficulty whatever in gaining admission to the New York Bar.

[12] U. S. Sup. Ct. Rule 5 (1).

[13] See 5 1971 Martindale-Hubbell Law Directory, *passim* (103d ed. 1970).

[14] In the District Court the appellants also attacked—unsuccessfully—the practice of conducting personal interviews. They do not appear to press such objections here, either as to the practice generally or as to the conduct of any particular interviews.

II

As stated at the outset of this opinion, New York has further standards of eligibility for admission to its Bar. An applicant must be a United States citizen and a New York resident of six months' standing. And before he may be finally admitted to practice, an applicant must swear (or affirm) that he will support the Constitutions of the United States and of the State of New York. Reflecting these requirements, Rule 9406 of the New York Civil Practice Law and Rules directs the Committees on Character and Fitness not to certify an applicant for admission "unless he shall furnish satisfactory proof to the effect" that he is a citizen of the United States, has resided in New York for at least six months, has complied with the applicable statutes and rules, and "believes in the form of the government of the United States and is loyal to such government."

The appellants do not take issue with the citizenship and minimum-residence requirements, nor with the items on the questionnaires for applicants dealing with these requirements. Their constitutional attack is mounted against the requirement of belief "in the form of" and loyalty to the Government of the United States, and upon those parts of the questionnaires directed thereto.

We do not understand the appellants to question the constitutionality of the actual oath an applicant must take before admission to practice. In any event, there can be no doubt of its validity. It merely requires an applicant to swear or affirm that he will "support the constitution of the United States" as well as that of the State of New York. See *Knight* v. *Board of Regents,* 269 F. Supp. 339, aff'd *per curiam,* 390 U. S. 36; *Hosack* v. *Smiley,* 276 F. Supp. 876, aff'd *per curiam,* 390 U. S.

744; *Ohlson* v. *Phillips*, 304 F. Supp. 1152, aff'd *per curiam*, 397 U. S. 317.[15]

If all we had before us were the language of Rule 9406, which seems to require an applicant to furnish proof of his belief in the form of the Government of the United States and of his loyalty to the Government, this would be a different case. For the language of the Rule lends itself to a construction that could raise substantial constitutional questions, both as to the burden of proof permissible in such a context under the Due Process Clause of the Fourteenth Amendment, *Speiser* v. *Randall*, 357 U. S. 513, and as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments, *e. g.*, *Baggett* v. *Bullitt*, 377 U. S. 360; *Barenblatt* v. *United States*, 360 U. S. 109; *Speiser* v. *Randall*, *supra*, at 527; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Sweezy* v. *New Hampshire*, 354 U. S. 234. But this case comes before us in a significant and unusual posture: the appellees are the very state authorities entrusted with the definitive interpretation of the language of the Rule. We therefore accept their interpretation, however we might construe that language were it left for us to do so. If the appellees be regarded as state courts, we are of course bound by their construction. See, *e. g.*, *Baggett*

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[15] Cf. U. S. Const., Art. VI, cl. 3:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."

See also U. S. Sup. Ct. Rule 5 (4), requiring an applicant for admission to the Bar of this Court to swear or affirm that he will "support the Constitution of the United States."

v. *Bullitt, supra,* at 375; *Kingsley International Pictures Corp.* v. *Regents of the University,* 360 U. S. 684, 688; *Speiser* v. *Randall, supra,* at 519; *Terminiello* v. *Chicago,* 337 U. S. 1, 5–6. If they are viewed as state administrative agencies charged with enforcement and construction of the Rule, their view is at least entitled to "respectful consideration," *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 96 (Cardozo, J.), and we see no reason not to accept their interpretation in this case.

The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow and fully cognizant of protected constitutional freedoms.[16] There are three key elements to this construction. First, the Rule places upon applicants no burden of proof.[17] Second, "the form of the government of the United States" and the "government" refer solely to the Constitution, which is all that the oath mentions. Third, "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith.

Accepting this construction, we find no constitutional invalidity in Rule 9406. There is "no showing of an intent to penalize political beliefs." *Konigsberg* v. *State Bar,* 366 U. S., at 54. At the most, the Rule as authoritatively interpreted by the appellees performs only the

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[16] Rule 9406 does not itself directly impinge upon applicants; it is rather an instruction to the appellees, touching applicants only as filtered through the appellees' construction.

[17] As this case comes to us from the District Court, the sum total of what applicants must do in the first instance to satisfy any "burden" placed upon them by the Rule is simply to answer two questions on the questionnaire they submit to the appellee committees. These questions are discussed in Part III of this opinion, *infra.*

function of ascertaining that an applicant is not one who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." *Bond* v. *Floyd*, 385 U. S. 116, 132.

III

As this case comes to us from the three-judge panel, the questionnaire applicants are asked to complete contains only two numbered questions reflecting the disputed provision of Rule 9406.[18] They are as follows:

> "26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ——— If your answer is in the affirmative, state the facts below.

[18] The District Court ordered the elimination or revision of the following questions contained in the questionnaires at the time this litigation was commenced:

"26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ——— If your answer is in the affirmative, state the facts below.

"27 (a). Do you believe in the principles underlying the form of government of the United States of America? ———"

"31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? ——— If the answer is 'Yes' state the facts." [In the Second Department the words "favorable or" did not appear.]

None of the above questions is in issue here.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

"27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?" ———.

In dealing with these questions, we emphasize again that there has been no showing that any applicant for admission to the New York Bar has been denied admission either because of his answers to these or any similar questions, or because of his refusal to answer them. Necessarily, therefore, we must consider the validity of the questions only on their face, in light of Rule 9406 as construed by the agencies entrusted with its administration.

Question 26 is precisely tailored to conform to the relevant decisions of this Court. Our cases establish that inquiry into associations of the kind referred to is permissible under the limitations carefully observed here. We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable. *Scales* v. *United States*, 367 U. S. 203, 228–230. It is also well settled that Bar examiners may ask about Communist

affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer. *Konigsberg* v. *State Bar*, 366 U. S., at 46–47. See also, *e. g.*, *United States* v. *Robel*, 389 U. S. 258; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Garner* v. *Board of Public Works*, 341 U. S. 716.[19] Surely a State is constitutionally entitled to make such an inquiry of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal.

As to Question 27, there can hardly be doubt of its constitutional validity in light of our earlier discussion of Rule 9406 and the appellees' construction of that Rule. The question is simply supportive of the appellees' task of ascertaining the good faith with which an applicant can take the constitutional oath. Indeed, the "without any mental reservation" language of part (b) is the same phrase that appears in the oath required of all federal uniformed and civil service personnel. 5 U. S. C. § 3331 (1964 ed., Supp. V). New York's question, however, is less demanding than the federal oath. Taking the oath is a requisite for federal employment, but there is no indication that a New York Bar applicant would not be given the opportunity to explain any "mental reservation" and still gain admission to the Bar.

[19] Division of Question 26 into two parts is wholly permissible under *Konigsberg* v. *State Bar*, *supra*, which approved asking whether an applicant had ever been a member of the Communist Party without asking in the same question whether the applicant shared its illegal goals. Moreover, this division narrows the class of applicants as to whom the Committees are likely to find further investigation appropriate. For those who answer part (a) in the negative, that is the end of the matter.

IV

Finally, there emerges from the appellants' briefs and oral argument a more fundamental claim than any to which we have thus far adverted. They suggest that, whatever the facial validity of the various details of a screening system such as New York's, there inheres in such a system so constant a threat to applicants that constitutional deprivations will be inevitable. The implication of this argument is that no screening would be constitutionally permissible beyond academic examination and extremely minimal checking for serious, concrete character deficiencies. The principal means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions.

Such an approach might be wise policy, but decisions based on policy alone are not for us to make. We have before us a State whose agents have evidently been scrupulous in the use of the powers that the appellants attack, and who have shown every willingness to keep their investigations within constitutionally permissible limits. We are not persuaded that careful administration of such a system as New York's need result in chilling effects upon the exercise of constitutional freedoms. Consequently, the choice between systems like New York's and approaches like that urged by the appellants rests with the legislatures and other policy-making bodies of the individual States. New York has made its choice. To disturb it would be beyond the power of this Court.

The judgment is

Affirmed.

[For concurring opinion of MR. JUSTICE HARLAN, see *ante*, p. 34.]

APPENDIX TO OPINION OF THE COURT

New York Judiciary Law (1968): Article 4—Appellate Division.

§ 90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

New York Civil Practice Law and Rules (1963): Article 94—Admission to Practice.

Rule 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

Rule 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the appellate division justices, including specifically his present and past places of actual residence, listing the street and number, if any, and the period of time he resided at each place.

Rule 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months prior to the filing of his application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

New York Judiciary Law Appendix (Supp. 1970): Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

PART 528—PROOF OF MORAL CHARACTER

§ 528.1 General regulation

Every applicant for admission to the bar must produce before a committee on character and fitness appointed by an Appellate Division of the Supreme Court and file with such committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor at law as provided in section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

§ 528.2 Supporting affidavits

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its committee on character and fitness or otherwise.

§ 528.3 Certificate of Board of Law Examiners

Every applicant who pursued the study of law pursuant to these rules must file with such committee on character and fitness his certificate from the State Board of Law Examiners showing compliance with these rules.

§ 528.4 Discretion of Appellate Division

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

AFFIDAVIT WITH RESPECT TO CHARACTER OF APPLICANT

Supreme Court of the State of New York

APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of

1. .....*

For Admission to the Bar

STATE OF
COUNTY OF } ss.:

2. ....., being duly sworn, makes the following statement:
3. Residence of affiant:
4. Nature of affiant's business:
5. Business address of affiant:
6. Length and nature of affiant's acquaintance with applicant:
   a. Residence of applicant:
   b. Persons with whom applicant lives (if known to affiant):
7. Affiant's conclusions as to applicant's moral character:
8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based:

9. IF THIS AFFIDAVIT IS MADE BY THE SPONSORING ATTORNEY, his sponsors' statement (see items 9 and 10 of instruction sheet) may be made here:

.....
(Signature)

Sworn to before me this .....
day of ....., 19....

(DO NOT FORGET TO HAVE ALL AFFIDAVITS NOTARIZED)

(NOTE: No back shall be put on Affidavits)

*Give name of applicant as it appears on the certificate of the State Board of Law Examiners.

NEW YORK SUPREME COURT,
APPELLATE DIVISION, SECOND
DEPARTMENT

IN THE MATTER OF THE
APPLICATION
of

.....
(Insert name of applicant)

for Admission to Practise as an Attorney and Counselor-at-Law

Form for Affidavit of Character and Residence

PLEASE NOTE

The answers to all questions are to be written, preferably in typewriting, by or under the direction of the affiant. It is desired that both the subject matter and the language of each answer shall be supplied by the affiant and not by the applicant. Nothing not personally known to affiant should be stated.

STATE OF.....
COUNTY OF..... } ss.:

....., the affiant, being duly sworn,
(Name of Affiant)

deposes and says that the answers to the following questions have been written by or under the direction of affiant, and that both questions and answers have been carefully read by affiant and that the several answers are true of affiant's own knowledge, except those stated to have been made on information and belief, and those stated to give the opinion or belief of affiant, and as to those answers, affiant believes them to be true.

1. (a) Home address of affiant (including County).
   (b) Business address.

2. Nature of business? (If a lawyer, state whether or not you are a *practising attorney* of the Supreme Court of the State of New York, and/or an attorney of any court or courts in any other state, country or jurisdiction, specifying each such state, country or jurisdiction, and give place of admission to the Bar, and approximate date of such admission.)

3. How long have you known the applicant personally?

4. State whether you are related to applicant by blood or marriage, or if there is any business, professional or similar relationship between you and the applicant or his family?

5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parenthesis, but the particular activities should be specified.

6. How often have you come in contact with applicant during the entire period of acquaintance? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer.)

7. What is your conclusion as to applicant's moral character? (Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's
   (a) parental home;
   (b) marital home, if any;
   (c) any other home or place of abode applicant may have had?

10. (a) How often have you visited the parental, marital or other home or place of abode of applicant? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

    (b) During what years (stating approximate dates)?

    (c) At what addresses (listing them specifically)?

(Insert date) Sworn to before me this

day of 19

.....
(Affiant to sign here)

.....
(Attesting officer to sign here)

.....
(Official designation)

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MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Of course I agree that a State may require that applicants and members of the Bar possess the good "character and general fitness requisite for an attorney." But it must be remembered that the right of a lawyer or Bar applicant to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore I think that when a State seeks to deny an applicant admission or to disbar a lawyer, it must proceed according to the most exacting demands of due process of law. This must mean at least that the right of a lawyer or Bar applicant to practice cannot be left to the mercies of his prospective or present competitors. When it seeks to deprive a person of the right to practice law, a State must accord him the same rights as when it seeks to deprive him of any other property. Perhaps almost anyone would be stunned if a State sought to take away a man's house because he failed to prove his loyalty or refused to answer questions about his political beliefs. But it seems to me that New York is attempting to deprive people of the right to practice law for precisely these reasons, and the Court is approving its actions.

Here the Court upholds a New York law which requires that a Bar applicant not be admitted "unless he shall furnish satisfactory proof" that he "believes in the form of the government of the United States and is loyal to such government." Rule 9406, New York Civil Practice Law and Rules. It also approves certain questions about political associations and beliefs which New York requires all applicants to answer. From these holdings I dissent.

In my view, the First Amendment absolutely prohibits a State from penalizing a man because of his beliefs. *American Communications Assn.* v. *Douds,* 339 U. S.

382, 445 (1950) (BLACK, J., dissenting). Hence a State cannot require that an applicant's belief in our form of government be established before he can become a lawyer. As Mr. Justice Roberts said in *Cantwell* v. *Connecticut:*

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U. S. 296, 303–304 (1940).

Assuming that a New York statute could constitutionally delegate to a committee of lawyers the power to interrogate applicants for the Bar, the specific questions asked in this case are flatly inconsistent with the First Amendment. Questions 26 (a) and 26 (b) state:

> "(a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ——— If your answer is in the affirmative, state the facts below.
>
> "(b) [D]id you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?"

I do not think that a State can, consistently with the First Amendment, exclude an applicant because he has belonged to organizations that advocate violent overthrow of the Government, even if his membership was "knowing" and he shared the organization's aims. *Yates*

v. *United States*, 354 U. S. 298, 339 (1957) (BLACK, J., concurring and dissenting). *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445 (1950) (BLACK, J., dissenting). The First Amendment was intended to make speech free from government control, even speech which is dangerous and unpopular. And included within the protection of the First Amendment is the right of association; the right to join organizations which themselves advocate ideas. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 361 U. S. 516, 527 (1960) (BLACK, J., and DOUGLAS, J., concurring); *Schneider* v. *Smith*, 390 U. S. 17 (1968). It therefore follows for me that governments should not be able to ask questions designed to identify persons who have belonged to certain political organizations and then exclude them from the practice of law.

Question 27 (b) asks: "Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?" In my view, this question also invades areas of belief protected by the First Amendment. Here the State seeks to probe an applicant's state of mind to ascertain whether he is "without any mental reservation, loyal to . . . the Constitution." But asking about an applicant's mental attitude toward the Constitution simply probes his beliefs, and these are not the business of the State. *Cantwell* v. *Connecticut*, *supra*; *American Communications Assn.* v. *Douds*, *supra* (BLACK, J., dissenting); cf. *In re Summers*, 325 U. S. 561, 573 (1945) (BLACK, J., dissenting). For these reasons, I would reverse the judgment of the court below.

Wholly aside from my own views in dissent on what the First Amendment demands, I do not see how today's decision can be reconciled with other decisions of this Court, to which I shall refer later. The majority seeks

to avoid this conflict by a process of narrowing construction. It states:

> "First, the Rule places upon applicants no burden of proof. Second, 'the form of the government of the United States' and the 'government' refer solely to the Constitution, which is all that the oath mentions. Third, 'belief' and 'loyalty' mean no more than willingness to take the constitutional oath and ability to do so in good faith." *Ante,* at 163.

Thus despite the New York law's command that no applicant shall be admitted "unless he shall furnish satisfactory proof" of his belief and loyalty, the Court holds that this law places on him no burden of proof. The Court seems to assert that this "construction" avoids the problems posed by *Speiser* v. *Randall,* 357 U. S. 513 (1958), where we held that taxpayers in order to obtain tax exemptions could not be made to bear the burden of proving that they did not advocate violent overthrow of the Government. We there pointed out that such an allocation of the burden of proof "can only result in a deterrence of speech which the Constitution makes free" because the "man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.,* at 526. I do not believe the Court's narrowing construction here avoids the force of *Speiser* for in this case the District Court determined, and the appellees do not contend otherwise, that the New York law places on the applicant a burden of "coming forward with some evidence" to satisfy the Committee. 299 F. Supp. 117, 147. In my view, even this shifting of the burden of coming forward is impermissible in light of *Speiser* v. *Randall.* The Court held in *Speiser* that

the defect in the California procedure was not only that the applicant bore the final burden of persuasion but that "when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until *the State comes forward with sufficient proof to justify its inhibition.*" *Id.*, at 528–529 (emphasis added). Although that case dealt with a tax exemption applicable to veterans, I can see no reason why the First Amendment should offer any less protection to applicants for admission to the Bar. If there is to be any difference at all, I should think a man's right to practice a profession should be accorded greater protection than his right to a tax exemption.

In Part III of its opinion the Court holds that New York may demand an answer to Question 27 (b) which asks whether the applicant is loyal to the Constitution "without any mental reservation."* The majority reasons that an answer to this question may be required because it assists the Committee in assessing "the good faith with which an applicant can take the constitutional oath." This constitutional oath referred to is simply a pledge that the applicant will "support the Constitution of the United States" and that of New York. I have no doubt whatsoever about the validity of this oath. See *Knight* v. *Board of Regents*, 269 F. Supp. 339 (SDNY 1967), aff'd *per curiam*, 390 U. S. 36 (1968). But the issue here is whether New York can conduct an inquisition into an applicant's beliefs hoping to discredit the sincerity of his oath.

The question requires an applicant to affirm that he holds a certain belief, namely that he is "loyal" "without any mental reservation . . . to . . . the Constitution." This requirement is a quite different thing from New York's constitutional oath, which is similar to that

*The question is set out in full, *ante*, at 165.

required of the President and of applicants for admission to the Bar of this Court. The latter are promissory oaths in which the declarant promises that he will perform certain duties in the future. But Question 27 (b) does not require a promise of future action. It demands that an applicant swear that he holds a certain belief at that very moment, loyalty to the Constitution "without any mental reservation." Aside from the serious vagueness problems which inhere in an oath that one is "loyal" "without any mental reservation," cf. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), this is an attempt to deny admission to the Bar for failure to hold a certain belief. And we have consistently held that the First Amendment forbids a State to impose a sanction or withhold a benefit because of what a man believes. *Baird* v. *State Bar of Arizona*, *ante*, p. 1, at 6–7; *id.*, at 9 (STEWART, J., concurring in judgment); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Cantwell* v. *Connecticut*, *supra*.

The majority's reasoning that Question 27 (b) may be employed to test an applicant's sincerity also flatly ignores our unanimous holding in *Bond* v. *Floyd*, 385 U. S. 116 (1966). There the Georgia House of Representatives excluded duly elected member Julian Bond on the grounds that his statements criticizing the Vietnam war gave "aid and comfort to the enemies of the United States" and showed he did not support the Constitution. *Id.*, at 125. We held that exclusion on these grounds violated Bond's First Amendment rights. The appellees there argued strenuously that the First Amendment did not deprive them of power to test Bond's "sincerity." A three-judge Federal District Court, one judge dissenting, had accepted the appellees' theory. 251 F. Supp. 333 (1966). But we reversed the court below on the ground that the existence of an oath of office:

> "does not authorize a majority of state legislators to test the sincerity with which another duly elected

> legislator can swear to uphold the Constitution. Such a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution." 385 U. S., at 132.

The majority offers no reason why a "sincerity test" may be applied to New York Bar applicants when it may not be applied to Georgia legislators.

Perhaps the majority considers it relevant that New York has not yet actually excluded a Bar applicant because of his lack of "sincerity" and perhaps would not permit such an exclusion. Certainly the unanimous holding in *Bond* seems to compel the conclusion that it would not approve denial of admission to the New York Bar because of insincere oath taking. Yet the majority opinion seems to indicate that such exclusion is permissible. And if New York cannot constitutionally use the results of its "sincerity test" to exclude an applicant, what valid state interest can possibly be served by this inquiry into an applicant's beliefs? *Baird* v. *State Bar of Arizona, supra,* at 6–7; *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539 (1963).

The only other possible ground I can see for the majority's failure to follow *Bond* v. *Floyd* is that it feels a state legislator's First Amendment rights are more worthy of protection than those of an applicant to the Bar. If our form of representative government is to function as the Framers of our Federal and State Constitutions intended, the right of legislators to dissent freely is essential. But the framers of the First Amendment intended also that its protection should extend not to some limited groups but to all citizens. Just as a democratic society needs legislators willing and able to criticize national and state policy, so it needs lawyers who will defend unpopular causes and champion unpopular

clients. As I have pointed out in another case involving requirements for admission to the Bar, society needs men in the legal profession

> "like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *In re Anastaplo,* 366 U. S. 82, 115–116 (1961) (BLACK, J., dissenting).

The Court also holds that New York may require applicants to answer Questions 26 (a) and 26 (b), which inquire about their associational activities and which have been set out in full, *supra,* at 175. I fail to see how the majority's approval of these questions can be reconciled with *Baird* v. *State Bar of Arizona, supra,* and *In re Stolar, ante,* p. 23. The majority's conclusion that these questions do not violate the First Amendment seems to be based on the assumption that the State may punish a man for knowing membership in an organization which advocates violent overthrow of the Government if he specifically intends to bring about such overthrow. On this assumption, the majority ap-

pears to conclude that since such conduct is criminally punishable, the State may inquire about it in order to exclude an individual who has been a member of one of these organizations with the requisite intent.

In *Baird* v. *State Bar of Arizona* and *In re Stolar*, we hold today that States may not require an applicant to the Bar to answer the question "have you been a member of any organization that advocates overthrow of the government by force?" Ohio recognized in *Stolar* that it could not exclude an applicant unless he had knowledge of the organization's aims at the time of his membership. However, it argued that its question was appropriate because it was merely a prelude to determining whether petitioner was a "knowing" member. We rejected that argument, and held that the First Amendment barred Ohio from demanding an answer to that question which required an applicant to supply information about political activities protected by the First Amendment. *In re Stolar, supra,* at 30, and see *id.*, at 31 (STEWART, J., concurring in judgment). Here the majority seems to concede that New York could not possibly exclude an applicant unless he had been a member of an organization advocating forcible overthrow, he knew of these aims, and *he had a specific intent to help bring them about. Ante,* at 165–166. Since even on the majority's theory New York cannot exclude an applicant unless *all* these requirements are met, why is the State permitted to ask Question 26 (a) which makes no reference to "specific intent"? In *Baird* and *Stolar* five members of the Court agreed that questions asked by Bar admissions committees were invalid because they inquired about activities protected by the First Amendment. Why then is the same result not required here?

It may be argued, of course, that Question 26 is sufficiently specific under the majority's standard because parts (a) and (b) *taken together* do include a "specific

intent" requirement. But the Court's holding permits the knowledge and specific intent elements of Question 26 to be split into two parts. This allows the State to force an applicant to supply information about his associations, which, even under the majority's rationale, are protected by the First Amendment.

But even if Questions 26 (a) and 26 (b) were combined into one question, this would not satisfy the standards set by the Court in *United States* v. *Robel,* 389 U. S. 258 (1967), and *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969). *Robel* involved a section of the Subversive Activities Control Act barring members of "communist-action" organizations from defense employment. The section was struck down for overbreadth because it sought "to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." 389 U. S., at 266. Thus the statute was found defective because it purported to bar persons on account of membership without regard to whether they had been knowing members and had an intent to overthrow the Government. In that case we held the Federal Government could not bar a man from private employment in defense facilities unless he had engaged in conduct which could be criminally proscribed. We recognized that banning a man from employment is a form of civil punishment which must meet the requirements of the First Amendment. Cf. *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). And in *Brandenburg* v. *Ohio, supra,* a unanimous Court made clear that association with a group to advocate violence cannot be punished consistently with the First Amendment. In *Brandenburg* we struck down an Ohio statute which purported to make criminal the act of associating with an assembly to advocate violence to achieve political reform. The Court held that advocacy of violence or the joining with others to do so could not be proscribed "ex-

cept where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. Clearly the New York questions are not nearly so narrowly drawn. New York seeks to inquire about membership in organizations advising or teaching violent overthrow, for the purpose of excluding persons who knowingly belong to such organizations with the requisite intent. See Brief for Appellees 14–15. However, it does not specify that the organization's advocacy must have been "directed to inciting or producing imminent lawless action" and "likely to . . . produce such action." Thus, for their failure to meet the *Brandenburg* requirements, the New York questions are overbroad. After our decision in *Robel*, it should make no difference that New York threatens to exclude people from their chosen livelihood rather than to put them in jail.

Perhaps the majority fails to recognize the force of *Robel* and *Brandenburg* because Bar applicants seek to become members of a profession very important to the welfare of society; in the majority's words, a profession "dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government." *Ante*, at 166. Unfortunately, there is some support in our past decisions for the proposition that lawyers are such a special group that they should not enjoy the full measure of constitutional rights accorded other citizens. See, *e. g.*, *Cohen* v. *Hurley*, 366 U. S. 117 (1961), where this Court held that a New York lawyer could be disbarred solely for relying on his privilege against self-incrimination and refusing to answer certain questions in a state investigation of professional misconduct. But I had thought that any such theory was clearly repudiated by our decision in *Spevack* v. *Klein*, 385 U. S. 511 (1967), which expressly overruled *Cohen*. In *Spevack* we held that New York could not disbar an

attorney for taking the Fifth Amendment in a disciplinary proceeding, and we stated:

> "Like the school teacher in *Slochower* v. *Board of Education*, 350 U. S. 551, and the policemen in *Garrity* v. *New Jersey* [385 U. S. 493] lawyers also enjoy first-class citizenship." 385 U. S., at 516.

I add only a few words, speaking as a member of the Bar. Quite obviously, its members should be men of high character and ability so that the Bar can fulfill the enormous responsibilities that face it. At the same time, its members and those who aspire to membership should not be disciplined or denied admission without full and unquestioned due process of law and protection of all their constitutional rights. Discipline or denial of admission should only take place after notice and hearing before an unquestionably impartial tribunal. I must repeat once again that consistently with due process of law, applicants for a profession cannot be turned over to the whim of their prospective competitors to determine their right to practice. I think the District Court did magnificent service in stripping the New York Bar of much of its unbridled power over the admission of new members. My only regret is that it did not strip it further.

For the foregoing reasons I respectfully dissent from the judgment of the Court.

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN joins, dissenting.

This litigation began with a comprehensive constitutional attack by appellants on longstanding state rules and practices for screening applicants for admission to the New York Bar.[1] During the course of the litigation

[1] The attack is upon rules of statewide application and practices administered by appellees in the First and Second Judicial Departments.

some of these practices were changed by appellees; others were found wanting by the three-judge court below, and changed as a result of that court's opinion and its final order. Now we face the residuum of the appellants' original challenge, and the Court today ratifies everything left standing by the court below. I dissent from that holding because I believe that appellants' basic First Amendment complaint, transcending the particulars of the attack, retains its validity. The underlying complaint, strenuously and consistently urged, is that New York's screening system focuses impermissibly on the political activities and viewpoints of Bar applicants, that the scheme thereby operates to inhibit the exercise of protected expressive and associational freedoms by law students and others, and that this chilling effect is not justified as the necessary impact of a system designed to winnow out those applicants demonstrably unfit to practice law.

As an abstract matter I do not take issue with the proposition that some inquiry into the qualifications of Bar applicants may be made, beyond such obvious threshold qualifications as residence or success in a regularly administered written examination. Accordingly, I would not upset the general rules which charter an inquiry as to the "fitness" of applicants, absent a showing not made here, that in practice the general rules work an impermissible result. But this is hardly the end of the case. For New York is not content with a politically neutral investigation into the fitness of Bar applicants to practice law. Screening officials are specifically directed by state law to assess an applicant's political beliefs and loyalties, and to scrutinize his associational and other political activities for signs that the applicant holds certain viewpoints. Such an inquiry, in my view, flatly offends the First Amendment, and state laws or adminis-

trative rules that license such an inquiry must be struck down.

Rule 9406 of the New York Civil Practice Law and Rules prescribes: "No person . . . shall be admitted to practice . . . unless he shall furnish satisfactory proof to the effect . . . that he believes in the form of the government of the United States and is loyal to such government . . . ."[2] The Court rightly notes that Rule 9406 is addressed to the appellees, that is, to the investigating committees which pass in the first instance on applications for admission, and also to the relevant judicial department of the Appellate Division of the New York Supreme Court. Appellees, pursuant to Rule 9406, require Bar applicants to answer a questionnaire now containing two questions designed to uncover information about an applicant's political loyalties and associational affiliations. Question 27,[3] set forth in the margin, is one natural consequence of Rule 9406—part (b) of Question 27 commands an applicant to tell whether he is "without any mental reservation, loyal to and ready to support the Constitution." Question 26[4] requires an

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[2] The full text of Rule 9406 is printed, *ante*, at 169.

[3] "27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?"

[4] "26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ———. If your answer is in the affirmative, state the facts below.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific

applicant to "state the facts" concerning his affiliation with any organization which he knew to advocate political change "by force, violence or any unlawful means." Under the scheme set in operation by Rule 9406, appellees' job is to evaluate all the information turned up by the questionnaire, by required affidavits, by a personal interview with the applicant, and by other means, and then to determine whether an applicant has made "satisfactory proof" of the specified political beliefs and loyalties.

I have no doubt whatever that Rule 9406, if read to mean what it says, must fall as violative of settled constitutional principles, or that any inquisition designed to implement a rule so written must equally be barred. Rule 9406 directs screening officials to probe the contents of an individual's political philosophy in order to ascertain whether he entertains certain beliefs as a matter of personal faith. The Rule, which charters an inquisition, fastens, not upon overt conduct, nor even on activities that incidentally involve the public exposure or advocacy of ideas, but on personal belief itself. Yet it is a settled principle of our constitutional order that, whatever may be the limits of the freedom to act on one's convictions, the freedom to believe what one will "is absolute." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940). As we said not long ago in *Stanley* v. *Georgia,* 394 U. S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The premise that personal beliefs are inviolate is fundamental to the constitutional scheme as a whole, see *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dis-

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intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?"

senting), and the premise is not questioned even in cases where this Court has divided sharply over the extent of the First Amendment's protections. See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382, 412 (1950) (Vinson, C. J., for the Court), and *id.,* at 446–448 (BLACK, J., dissenting). In the present case we have a rule of New York law which, as written, sanctions systematic inquiry into the beliefs of Bar applicants, and excludes from the practice of law persons having beliefs that are not officially approved.[5] This inquiry and this criterion for exclusion are impermissible. However wayward or unorthodox a man's political beliefs may be, he may not be kept out or drummed out of the Bar or any other profession on that account.

The Court purports not to uphold—not to pass upon—Rule 9406 unvarnished. While conceding that the Rule, as it has been written, is constitutionally problematical, the Court asserts that it should be judged in light of the "extremely narrow" interpretation proffered by appellees, who are charged with administering the investigatory scheme contemplated by the Rule. According to the proposed administrative construction, Rule 9406 merely directs appellees to discover whether a Bar applicant is willing and able to promise that he will support the Constitutions of the United States and the State of New York. An oath promising support for the Federal and State Constitutions is required of persons

[5] In addition to the defects mentioned at text, Rule 9406, as written, violates the principle of *Speiser* v. *Randall,* 357 U. S. 513 (1958). Rule 9406 provides that "no person shall be admitted" to the New York Bar "unless he shall furnish satisfactory proof" of required beliefs and loyalties. *Speiser* condemns placing evidentiary burdens on an applicant for a public benefit, when the benefit may be denied because of the nature of the applicant's expressive and associational activities. Difficulties in proving the innocence of conduct may deter protected activity as much as a substantive standard that burdens privileged activity by its terms.

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admitted to the practice of law in New York, as of state officers generally.[6] The Court's argument, then, is that since the "support" oath may validly be required, see *Knight* v. *Board of Regents*, 269 F. Supp. 339 (SD NY 1967), aff'd *per curiam*, 390 U. S. 36 (1968), it is permissible for appellees to inquire into the willingness and the ability of applicants to take the support oath in full honesty and good faith—further, that since Rule 9406 has been "construed" to sanction no more than such an inquiry into applicants' sincerity, the Rule and the whole investigatory scheme of the Rule should be upheld.

There are several flaws in the Court's analysis. We are told that while the Rule may be too sweeping, the administrative construction is narrow enough, so the construction saves the Rule. But this argument cannot merit embrace unless, in the first instance, we are able to ascertain the meaning and the sweep of the administrative interpretation itself. The majority opinion points to no New York case law that shows what the proffered interpretation means. Nor, I think, can the Court comfortably point to appellees' past practice as a guide to the proper interpretation of Rule 9406. For the opinions below and the papers in this case reveal that these appellees, prior to the launching of this litigation, thought it their duty to make virtually unlimited inquiry into an applicant's associational, political, and journalistic activities.[7] Thus past administrative practice, which may

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[6] See N. Y. Judiciary Law § 466 and N. Y. Const., Art. 13, § 1, prescribing the following oath:

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability."

[7] Judge Motley's separate opinion below states portions of appellees' original, unrevised questionnaires that give some idea of appellees' original conception of their mission under Rule 9406. These questionnaires, utilized in the First or the Second Judicial

sometimes be helpful in clarifying the sweep of a doubtful law, cf. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96–97 (1935), in this case is no help at all in settling constitutional doubts concerning the reach of Rule 9406. Appellees' announcement that they will be more restrained, and will focus their inquiries on "sincerity," is of course entitled to the full respect of a reviewing court. Nonetheless, I do not believe that Rule 9406 is saved by the announcement. At any rate, we certainly are not confronted by "long usage" giving "well-defined contours," see *ante*, at 159, to appellees' proposed construction of the challenged Rule.

A second defect of the Court's analysis is that any attempt to assimilate Rule 9406 to the "support" oath, for First Amendment purposes, must fail. The majority urges such an assimilation on the theory that " 'the form of the government of the United States' and the 'govern-

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Department, or both, asked *inter alia* for a list of all "unfavorable incidents in your life," a list containing "each and every club, association, society or organization of which you are or have been a member," a list of "any articles for publication" written by an applicant. An applicant was asked whether he had ever "contributed in any way or signed a petition for" any subversive organization, or had "participated in any way whatsoever" in such organization's activities. Each applicant was required to "[s]tate . . . in not less than 100 words" what he thought were the "principles underlying the form of government of the United States." See 299 F. Supp., at 137–139.

The revised questionnaires for the two departments, the ones passed upon by the court below, had eliminated the most obvious constitutional defects of the original questionnaires. Still, certain remaining questions were found wanting in the District Court's opinion—for example, the precursor to present Question 26. In fact, the only question in the present questionnaire that appears to reflect an "extremely narrow" focus on insincerity of a prospective oath taker—Question 27 (a)—was drafted by the District Court as part of its final order. Appellees' own proposed rewording was rejected.

ment' [terms of Rule 9406] refer solely to the Constitution, which is all that the oath mentions." Yet as MR. JUSTICE BLACK's dissent today makes clear, the oath of constitutional support is promissory and forward looking in nature, while the focus of the challenged Rule is quite different. The oath of constitutional support requires an individual assuming public responsibilities to affirm, in entirely familiar and traditional language,[8] that he will endeavor to perform his public duties lawfully. This is a far cry from Rule 9406, or Question 27 (b) of appellees' questionnaires, both of which are designed to probe the personal political philosophy that an applicant entertains, his beliefs and loyalties and even his "mental reservations." To require the traditional oath of constitutional support does not put government in the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints of individuals. For that reason the validity of the support oath is *sui generis,* and does not serve to justify the investigatory scheme set up by Rule 9406.

Surely it is a mistake to conclude that because a State may administer a support oath, it may therefore conduct an investigation into the beliefs and affiliations of Bar applicants in order to gauge the depth of their "willingness to take the constitutional oath and ability to do so in good faith." The seeming logic of this position was flatly repudiated in *Bond* v. *Floyd,* 385 U. S. 116 (1966). In that case the Court confronted the record of an actual inquiry into the "sincerity" of a prospective oath taker, and the inquiry was found to be an impermissible encroachment on First Amendment freedoms. The Court noted that the power "to test the sincerity" of a person who must take an oath of constitutional support "could be utilized to restrict the right . . . to dissent from na-

[8] See U. S. Const., Art. VI, cl. 3; U. S. Sup. Ct. Rule 5 (4).

tional or state policy . . . under the guise of judging . . . loyalty to the Constitution." *Id.*, at 132.[9] This is the very power which appellees claim under what the Court calls an "extremely narrow" construction of Rule 9406. It is a power of uncertain and dangerous dimension, and patently susceptible of censorial abuses.

For me the conclusion is inescapable that appellees' construction, far from saving Rule 9406, actually compounds its constitutional defects. The original vice of the Rule remains. State screening officials still are licensed to investigate an applicant's political activities and affiliations, and to probe his beliefs and loyalties and "mental reservations"—all this supposedly for the sake of protecting the integrity of the oath of constitutional support. The professed rationale of the enterprise may have been refurbished, but the search for true belief and unreserved loyalty remains. So construed, Rule 9406 is plainly overbroad. It sanctions overreaching

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[9] In the Motion to Affirm appellees rely on the following language in *Bond:* "Nor is this a case where a legislator swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." 385 U. S., at 132. This negative characterization of the facts in *Bond,* barely a dictum, should not be read to approve systematic inquiry into beliefs and affiliations in order to test "sincerity." Whatever a State may do when an oath taker himself contemporaneously "declares" or "manifests" contempt for the oath he is taking, it is quite a different matter to put the onus on a prospective oath taker to satisfy screening officials that his political activities and beliefs comport with the officials' notions of "sincerity." Indeed, Question 27 (a), which was written by the District Court, addresses the limited concerns of the *Bond* dictum and handles the remote risk that the oath-taking ceremony might be disrupted by an unwilling applicant. In pressing their search for sincerity beyond Question 27 (a), appellees cast serious doubt on their own assertion that Rule 9406 places no evidentiary burden on an applicant, and thereby reinforce the claim that Rule 9406 violates the principle of *Speiser* v. *Randall,* 357 U. S. 513 (1958). See n. 5 *supra.*

official inquiries. It is impermissibly sweeping as a criterion for exclusion from the Bar. The Rule as interpreted suffers from the very defects that this Court has found fatal to other schemes that have sought to predicate the grant or denial of public benefits on a person's political affiliations and viewpoints. See, *e. g., United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); cf. *Schneider* v. *Smith,* 390 U. S. 17 (1968).

Appellees' gloss compounds the defects of the Rule, in my view, because the proffered interpretation is vague in the extreme. It is of course conceivable that an inquiry into a Bar applicant's "sincerity" might be quite simple and definite in scope. Appellees suggest in the Motion to Affirm that some inquiry might be useful "to avoid the difficulty of having one individual demur to the taking of [the support] oath at the very moment prior to admission." But this limited objective of avoiding an embarrassing disruption of the admission ceremony is adequately handled by Question 27 (a), as drafted by the District Court. Plainly, appellees have a good deal more in mind, as is shown by their insistence that Question 26 and Question 27 (b) aid in determining an applicant's "sincerity." These are the questions that focus on beliefs, loyalties, and affiliations. I cannot say that a Bar applicant, a law student, or anyone else is given fair warning as to the kind of political activities and affiliations that appellees mean to penalize as evidencing "insincerity." Thus, in my view, Rule 9406, as construed, is fatally vague. Standards of definiteness must be strict as to legal rules which trench on First Amendment activities. *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963). See *United States* v. *National Dairy Corp.,* 372 U. S. 29, 36 (1963). The irreducible vices of due process vagueness, arising when those who

may be penalized by a legal rule cannot ascertain the rule's scope and avoid its burdens, see *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939), are inevitably heightened when the result is deterrence of protected activity. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287–288 (1961). Appellants' fundamental complaint throughout this litigation has concerned the inhibitory impact of New York's screening system on the exercise of First Amendment rights. I agree that the chilling effect of Rule 9406, as construed, is exacerbated by the sort of vagueness that this Court has condemned on a number of hardly distinguishable occasions. See, *e. g.*, *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents*, *supra*; *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction*, *supra*.

A further word is required concerning the validity of Question 26 of appellees' questionnaire. The Court expressly approves Question 26, but fails to consider the relationship of the question to Rule 9406 itself, beyond noting that Question 26 "reflects" the Rule's command that an applicant's beliefs and loyalties be investigated. I believe it is a mistake to consider the question entirely in isolation from the investigatory scheme set up by the Rule. See *Whitehill* v. *Elkins*, *supra*, at 56–57 ("we must consider the oath with reference to [related provisions concerning subversives], not in isolation"). Question 26 is undeniably a key part of that scheme. The District Court saw Rule 9406 as an instruction to screening officials "to satisfy themselves through analysis of the factual data before them" that an applicant has requisite beliefs and loyalties. See 299 F. Supp., at 126. Question 26 is a potent device for uncovering "factual data" about an applicant's associational affiliations.

Question 26 (a) asks whether the applicant has "ever organized or helped to organize or become a member of" any association that he knew was "advocating or teaching" that any local, state, or federal governmental institution "should be overthrown or overturned by force, violence or any unlawful means." Plainly this language covers a wide range of associational activities fully protected by the First Amendment, along with some conduct that may not be privileged. The question is not aimed at concerted activity of whatever sort oriented to the doing of illegal acts, but at affiliations with political associations that "advocate" or "teach" certain political ideas. All kinds and degrees of affiliation are covered: indifferent and energetic members alike, in well-disciplined organizations or in any transitory "group of persons." There is no specificity in the phrase, "overthrown or overturned by force, violence or any unlawful means." The language covers all advocacy of thoroughgoing political change to be brought about partly through unlawful acts—acts to be done now, or at some hypothetical future moment which may or may not occur—acts of bloody and atrocious terror, or conscientious action involving nonviolent disobedience to law. "Advocating or teaching" includes the most abstract sort of doctrinal discourse, and ideological utterances altogether ancillary to the political program of a given association.

Even when viewed in isolation from Rule 9406, Question 26 (a) reveals itself as an indiscriminate and highly intrusive device designed to expose an applicant's political affiliations to the scrutiny of screening authorities. As such, it comes into conflict with principles that bar overreaching official inquiry undertaken with a view to predicating the denial of a public benefit on activity pro-

tected by the First Amendment.[10] Three particular difficulties may be mentioned. First, Question 26 (a) is undeniably overbroad in that it covers the affiliations of those who do not adhere to teachings concerning unlawful political change, or are simply indifferent to this aspect of an association's activities. *Elfbrandt* v. *Russell*, 384 U. S. 11, 16–19 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 510–512 (1964). Second, no attempt has been made to limit Question 26 (a) to associational advocacy of concrete, specific, and imminent illegal acts, or to associational activity that creates a serious likelihood of harm through imminent illegal conduct. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449;

[10] Part (a) of Question 26 is not rendered harmless by reason of the fact that part (b) limits somewhat the breadth of the question as a whole. In the first place, it must be remembered that neither part (a) nor part (b) states the operative criterion for excluding applicants on the basis of political affiliations—the criterion for exclusion, one of impermissible latitude, is given in Rule 9406 itself. Second, if all applicants who answer part (b) in the affirmative were therefore excluded, while those falling within part (a) only were admitted, the result would still be constitutionally problematical. See n. 11 *infra*. Third, overreaching inquiries are not cured simply by adding narrower follow-up questions. Obviously a State cannot hope to justify the sort of informational demand condemned today in *In re Stolar*, *ante*, p. 23, on the theory that the overintrusive inquiry is part of a series that culminates in a sufficiently narrow question. When the questioning is directed at the political activities and affiliations of applicants for a public benefit, the scope of questioning must be carefully limited in light of the permissible criteria for denying the benefit. *Schneider* v. *Smith*, 390 U. S. 17, 24 (1968); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). There is no justification for a requirement of overbroad disclosure that chills the exercise of First Amendment freedoms and is not tailored to serve valid governmental interests. See *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (1963); *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *NAACP* v. *Alabama*, 357 U. S. 449, 462–463 (1958).

Keyishian v. *Board of Regents*, 385 U. S., at 599–601. Third, would-be Bar applicants are left to wonder whether particular political acts amount to "becom[ing] a member" of a "group of persons"—law students and others, when embarking on associational activities, must guess whether the association's teachings fall within the nebulous formula of Question 26 (a), or, more to the point, whether their own assessment of an association's teachings would coincide with that of screening officials. There are penalties for failing to "state the facts" required by Question 26 (a) when the time to make application comes. The indefinite scope of Question 26 (a) expectedly operates to induce prospective applicants to resolve doubts by failing to exercise their First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S., at 493–494; *Baggett* v. *Bullitt*, 377 U. S., at 367–370.

But whatever may be thought of Question 26 or either of its two parts standing alone,[11] it remains that the function of the question is to generate "factual data" about an applicant's political affiliations and activities to be judged ultimately by the operative standards of Rule

[11] Part (b) of Question 26 limits part (a) in one respect: applicants affiliated with an association of the kind characterized in part (a), but who do not endorse the association's teachings concerning unlawful political change, need not answer part (b) in the affirmative. Naturally in other respects part (b) has the same sweep as part (a). "Specific intent" in this context means doctrinal agreement with the ideological tenets of part (a) associations—or, as appellees put it in their brief, " 'specific intent' to further the advocacy" of drastic change to be brought about in part by unlawful means. Again the "unlawful means" might be nonviolent or bloodthirsty. The association might be a discussion group lasting for a week. The advocacy might be oriented to a far and contingent future or to the here and now; it might be innocuous or likely to cause imminent and serious harm. A prospective applicant might well be in doubt whether particular associational activity evinces "specific intent" or not—or whether, years later perhaps, screening officials would be willing to infer this state of mind.

9406. Doubts concerning the propriety of the question are intensified when the question is viewed realistically as part of the investigatory scheme set up by the Rule. Cf. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967). In "stat[ing] the facts" as required by Question 26, an applicant exposes himself to the grave risk that screening officials will find him wanting in respect of the requisite beliefs and loyalties. The impermissible latitude of Rule 9406 as a criterion for exclusion, in conjunction with overintrusive probing for details about an applicant's associational affiliations, creates an obvious *in terrorem* effect on the exercise of First Amendment freedoms by law students and others. The interwoven complexity and uncertain scope of the scheme heighten the danger that caution and conscientiousness will lead to the forfeiting of rights by prospective Bar applicants. See *Keyishian* v. *Board of Regents*, *supra*, at 604. Appellees' attempt to save the whole scheme by restrictive construction of the Rule amounts, in my view, to little more than a declaration of beneficent intent, and we have said that good intentions "do not neutralize the vice" of vagueness and overbreadth. *Baggett* v. *Bullitt*, *supra*, at 373. The valid aims of appellees' screening efforts can be achieved without casting a pall on protected activity. But Question 26, viewed in light of Rule 9406, overreaches legitimate concerns and places an impermissible burden on the exercise of fundamental rights.

For the reasons stated I would strike down the portions of Rule 9406 discussed herein, as written and construed, and also Questions 26 and 27 (b). To that extent I would reverse the District Court.

DYSON, CHIEF OF POLICE OF DALLAS, ET AL. *v.* STEIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 41. Argued April 30, 1970—Reargued November 16, 1970—Decided February 23, 1971

Appellee newspaper publisher, who had been charged with violating a Texas law prohibiting the possession of obscene materials, brought this action in a federal district court for an injunction to prevent the Dallas police from arresting him and seizing his property on obscenity grounds without a prior judicial determination of obscenity and for a declaration of the rights of the parties with respect to the statute. A three-judge court was convened and issued declaratory and injunctive relief, holding two parts of the statute unconstitutional and ruling that another part would be constitutional only if the obscenity definition was changed. *Held:* There was no finding of irreparable injury to appellee and hence no proper basis for federal interference with the pending state criminal prosecution. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell, ante,* p. 66.

300 F. Supp. 602, vacated and remanded.

Lonny F. Zwiener, Assistant Attorney General of Texas, reargued the cause for appellants. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, *Robert C. Flowers,* Assistant Attorney General, *Henry Wade, pro se, Wilson Johnston, N. Alex Bickley, Thomas B. Thorpe,* and *Preston Dial.*

David R. Richards reargued the cause for appellee. With him on the briefs was *Melvin L. Wulf.*

Stanley Fleishman filed a brief *pro se* et al. as *amici curiae* urging affirmance.

PER CURIAM.

The appellee, Stein, published a bi-weekly newspaper, the Dallas Notes. Stein was charged with two violations of Art. 527, § 1, of the Texas Penal Code, which then prohibited, among other things, the possession of obscene materials.* While these two cases were pending

*Texas Penal Code, Art. 527, 1961 Tex. Gen. Laws, c. 461, § 1, provided:

"Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

"Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

"Sec. 3. For purposes of this article the word 'obscene' is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas.

"Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

"Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any

in state courts, Stein brought the present action in a federal district court under 42 U. S. C. §§ 1983, 1985, representing himself and a class consisting of present and future employees of and contributors to his newspaper. The defendants were the district attorney of Dallas County, and the Dallas chief of police. He sought:

> "[P]ermanent injunctive relief against the Dallas Police Department, requiring that . . . there be no arrest of plaintiff, nor seizure of his property on grounds of obscenity without a prior judicial determination of the obscene character of the material in question; . . .
>
> ". . . That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code;
>
> ". . . That the Court grant such other and further relief as is just and equitable."

A three-judge court was convened. 28 U. S. C. § 2284. That court refused to require a hearing on the

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bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

"The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

"The provisions of this Act shall not apply to any daily or weekly newspaper.

"Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act."

obscene character of the material before its seizure and the arrest of the plaintiff. It held that the request for such relief was "based on the alleged harassment and . . . not an attack upon the constitutionality of a statute." The court went on to emphasize that its consideration did "not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face." The three-judge court then turned to the statute itself, and held that §§ 1 and 2 were unconstitutional, and that § 3 would be constitutional only if the definition of obscenity were changed somewhat. The court issued appropriate declaratory and injunctive relief effectuating its conclusions. 300 F. Supp. 602 (1969). Texas officials appealed, and we noted probable jurisdiction. 396 U. S. 954 (1969).

Today we have again stressed the rule that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened. *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943). The existence of such injury is a matter to be determined carefully under the facts of each case. In this case the District Court made no findings of any irreparable injury as defined by our decisions today; therefore, the judgment of the District Court is vacated and the case is remanded for reconsideration in light of *Younger* v. *Harris*, *ante*, p. 37, and *Samuels* v. *Mackell*, *ante*, p. 66. See also *Boyle* v. *Landry*, *ante*, p. 77.

It is so ordered.

MR. JUSTICE WHITE concurs in the result.

[For concurring opinion of MR. JUSTICE STEWART, see *ante*, p. 54.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

My Brother DOUGLAS' dissenting opinion describes graphically the police conduct upon which appellee rested his allegations of bad faith and harassment. If proved, these allegations would justify federal intervention. The mass seizure of some two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of *Near* v. *Minnesota*, 283 U. S. 697 (1931).

But these questions are not before us. The three-judge court below remanded to a single judge for determination all questions advanced by appellee except the contention that the Texas statute was unconstitutional on its face, and the appellee does not challenge this order of remand here. I, therefore, would reverse the judgment of the District Court, except for paragraph 4, for the reasons stated in my separate opinion in *Perez* v. *Ledesma*, *ante*, p. 93.

MR. JUSTICE DOUGLAS, dissenting.

I

The two raids in this case were search-and-destroy missions in the Vietnamese sense of the phrase. In each case the police came at night. The first search warrant authorized a search and seizure of "obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature" concealed at a given

address. The seizures included: two tons of a newspaper (Dallas Notes), one photograph enlarger, two portable typewriters, two electric typewriters, one camera, "numerous obscene photographs," and $5.43 in money.[1] The second warrant was issued 16 days later, in response to a claim that marihuana was concealed on the premises. It authorized the officers "to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided." Not finding any marihuana on the premises, the sergeant asked instructions from his lieutenant. He was told to seize pornographic literature and any equipment used to make it. He "didn't know what to seize and what not to seize so [he] just took everything." "Everything" included a Polaroid camera, a Kodak Brownie, a Flocon camera, a Kodak lamp, a floating fixture lamp, a three-drawer desk containing printers' supplies, a drafting square, a drafting table, two drawing boards, a mailing tube, two telephones, a stapler, five cardboard boxes containing documents, one electric typewriter, and one typewriter desk. A poster of Mao Tse-tung, credit cards, costume jewelry, cans of spices, a brown sweater, and

[1] This indiscriminate seizure is hardly surprising since none of the officers knew what to seize, as the questioning of the lieutenant in charge of the raid shows:

"Q. What instructions did you give the officers in effecting this search and seizure as to what they were to do?

"A. They were to search for any obscene material they could find. All of our officers know what obscene material is.

"Q. What is obscene material?

"A. Well, I wish you hadn't ask [*sic*] that. I take that back. They don't know, neither do I.

"Q. What instructions had you given them in terms of what they were to do?

"A. To search for obscene material and seize it.

"Q. What definition, if any, did you give them as to obscene material?

"A. I didn't."

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a statue of a man and woman in an embrace were also seized. Thus the newspaper Dallas Notes, a bi-monthly, was effectively put out of business.[2]

It would be difficult to find in our books a more lawless search-and-destroy raid, unless it be the one in *Kremen* v. *United States*, 353 U. S. 346. If this search-and-destroy technique can be employed against this Dallas newspaper, then it can be done to the New York Times, the Washington Post, the Seattle Post Intelligencer, the Yakima Herald-Republic, the Sacramento Bee, and all the rest of our newspapers. For, as I shall point out, the Texas statute governing "obscenity" [3] is plainly unconstitutional.

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[2] Appellee Stein has since reached an agreement with the Dallas Police Department by which it returned most of the property to him in return for his execution of an Indemnity and Release Agreement. The binding effect of such an agreement, which required Stein to choose between the return of his property so that he could continue publishing, and assertion of his civil rights under such provisions as 42 U. S. C. § 1983, is not at issue here.

The Dallas Police Department still holds "film negatives, eight or ten photographs, one movie advertisement poster, one litho copy of paper, and a representative number of back issues of paper entitled 'Dallas Notes' or 'Notes from the Underground.'"

[3] Article 527 defined "obscene" as follows in § 3:

"[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

After the three-judge court decision, Art. 527 was amended to define "obscene" as "material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value."

And "prurient interest" was defined as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond

Government certainly has no power to close down newspapers. Even censorship—whether for obscenity, for irresponsible reporting or editorials, or otherwise—is taboo. As Chief Justice Hughes said in *Near* v. *Minnesota,* 283 U. S. 697, decided in 1931:

> "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Id.,* at 719–720.

I agree with that view.

It is said, however, that these issues are not before us as the case has been remanded to a single judge to pass on them. But we deal with plain error, as the state statute is unconstitutional on its face and we should put an end to lawless raids under it.[4]

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customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience." Tex. Penal Code, Art. 527, § 1 (Supp. 1970–1971).

[4] The appellee did not appeal from the decision of the District Court to remand the issue of harassment to a one-judge court, apparently since the ruling that the statute was unconstitutional

II

The constitutional mandate that government [5] "shall make no law . . . abridging the freedom of speech, or of the press" precludes in my view any form of censorship. Vicious, irresponsible, and depraved as the press often is, the constitutional remedy is not censorship.[6] The antidote is education, pinning our faith to the Jeffersonian creed that by education we may in time become a mature people.[7]

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made such further relief unnecessary, as all the harassment resulted from the enforcement of the statute. In this Court appellee has argued that his "constitutional rights [are] threatened by the existence of the Texas obscenity statute *and the overbearing means chosen to enforce it.*" He has raised the issue of harassment here and the documentary evidence in support of his claim is overwhelming.

[5] The First Amendment, originally applicable only to the Federal Government, was by virtue of the Fourteenth Amendment made applicable to the States in 1931 in *Stromberg* v. *California*, 283 U. S. 359.

[6] Thomas Jefferson wrote, "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost." Jefferson, Democracy, selected and arranged by S. Padover 150–151 (1939).

[7] Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 357, 375–376, said:

"Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—

I have set forth my views over and over again as to why the First Amendment should be strictly construed; and they need not be repeated here. It is difficult—indeed impossible—to read the constitutional mandate that government "shall make no law" abridging freedom of the press to mean that government "may make some laws" abridging that freedom. Certainly a strict constructionist cannot so read it.

> "The Court says it has been trying to balance the interests of society in protecting itself from the supposed evils of obscene material with the real interest in freedom of expression. There is ample evidence that the clear and definite language of the first amendment was intended to preclude the very problem of balancing assumed by the Court. The first amendment holds that the interest of society in freedom of expression [8] is more important than the harm that might flow from obscene material. The very interest in protection from injury from obscene material would be better served by allowing each individual to make a free appraisal of pornographic material. A hallmark of an immature and insecure society is the censorship of ideas. Censorship, which insulates all from what some suppose to be evil, merely magnifies that insecurity. If society does such a poor job of educating itself so that four letter words and explicit pictures are dangerous, the remedy is to improve the educational process, not

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the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

[8] We deal with a large and considerable problem. There are those who believe that an "ethic of sexuality joined with an ethic of the wholeness of life" (F. Darling, Wilderness and Plenty 75 (1970)) has a close relation not only to population control but to a reverence for both the land and animal life.

> to outlaw certain publications. While the first amendment does not mandate better education it does prohibit the censorship of ideas. This use of a balancing test evidences a misconception of the constitutional nature of society. There is nothing to balance. Society's security flows directly and solely from the freedom and security of each individual." 31 Albany L. Rev. 143, 151 (1967).

If I am correct in concluding that a State can make "no law" censoring the press because of obscenity, then a publisher threatened by such a law can go into a federal court to enjoin state officials from enforcing the law, as I made clear in my dissent in *Younger* v. *Harris*, *ante*, at 59. The special circumstances where such federal intervention is permissible are not restricted to bad faith on the part of state officials or the threat of multiple prosecutions. As Mr. Justice Butler, writing for the Court, said in *Terrace* v. *Thompson*, 263 U. S. 197, 214:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity."

And see *Watson* v. *Buck*, 313 U. S. 387, 402.

No possible construction of this state law can save it. This is not a situation where mere overbreadth of a state statute may have chilling or crippling effects on First Amendment rights. This is a case where Texas has

entered a field which the Constitution bars all the States and the Federal Government from entering.

The Texas obscenity statute, as I view it, meets precisely the hypothetical statute we discussed in *Watson* v. *Buck*, 313 U. S. 387, 402:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

No clearer case justifying federal intervention to prevent a state criminal trial can be imagined.

No pending prosecutions are sought to be enjoined, only future ones.[9] Such an injunction is not impermissible under 28 U. S. C. § 2283. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2, and my dissent in *Younger* v. *Harris*, *ante*, at 65. Appellee also asked for declaratory relief. If *Zwickler* v. *Koota*, 389 U. S. 241, means anything, it means that such relief can also be granted.

III

If a publication deemed "obscene" is not under the umbrella of the First Amendment, then I do not see how it enjoys many constitutional safeguards. That which is out from under the First Amendment would normally be subject to the police power of the States. Yet the Constitution contains no standards or suggestions of standards respecting the vast array of subjects that various vocal groups would like to have suppressed—obscenity, sacrilege, un-Americanism, anti-clerical ideas, atheistic or anti-ecclesiastical ideas, Communism, racism,

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[9] The amended complaint asked for an injunction *only* against future arrests and prosecutions under the Texas statute, Art. 527, and a declaration that the statute was unconstitutional. See n. 3, *supra*.

and so on. Under the Constitution as written there are no standards of "good" or "bad" for the press. Since there is no constitutional definition of obscenity, the definition must be largely, if not exclusively, for legislative determination. Absent a controlling constitutional standard, I would think that a legislature could treat literature as it treats sewage effluent or infectious disease. That is not a happy prospect, for some would put even the Song of Solomon under the ban. It is, I fear, where we end once we lose our First Amendment moorings. Administrative censorship, however, is one thing. Criminal punishment is quite another. Publishing "obscene" literature cannot, as I view it, be made a crime under our constitutional standards.

"Whatever 'obscenity' is, it is immeasurable as a crime and delineable only as a sin. As a sin, it is present only in the minds of some and not in the minds of others. It is entirely too subjective for legal sanction. There are as many different definitions of obscenity as there are men; and they are as unique to the individual as are his dreams." Note, The Substantive Law of Obscenity: An Adventure in Quicksand, 13 N. Y. L. F. 81, 131 (1967).

What appeals to "prurient interests" describes sin to some but not to others and seems to me to be far too vague to pass muster as a criminal, as distinguished from an administrative, statute.[10]

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[10] This business of leveling the power of the Federal or State Government against a person in a criminal prosecution is an "awesome" power as MR. JUSTICE BLACK has stated:

"Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance." *Ginzburg v. United States*, 383 U. S. 463, 477 (dissenting opinion).

I see no help on the vagueness problem even if the test "utterly without redeeming social importance" were added to the criminal standard, as it was in *Jacobellis* v. *Ohio*, 378 U. S. 184, 191.[11] That is a measurement which again is wholly subjective. It cannot be related to anything but the judge's or jurors' sophistication or stage of cultural development. Nor do I think the problem is helped by introducing the concept of "contemporary community standards" whether that refers to the public at large or a local county or town standard. *Id.*, at 193.

The two tests—this Court's and that of Texas—seem to me to be substantially identical. I do not see how either can be held to be constitutional. The standard of guilt is wholly subjective. The jurors can convict or acquit according to their own personal tastes, their cultural standard, their literacy, and their tolerance for opposed ideas. And the same would be true of judges. It means that a book that is hailed as wholesome in one county may be the cause of punishment in another county of the same State.

The evidence in obscenity prosecutions is usually expert testimony. Analysts, English literature scholars, and others often have helpful and informed views, one way or the other. It seems impossible, if we continue to sanction the use of these vague standards in criminal prosecutions, that verdicts will be rendered which are based on the record and not on the emotional factors reflecting the prejudices of the judge or jurors.

Uncertainty, rather than certainty, is the standard. The book, play, poem, or movie is approved or condemned on the basis of the personal beliefs of the judge or jurors, not on the ban of a statute containing clear and objective standards.

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[11] See n. 3, *supra*.

The concept of "utterly without redeeming social importance" will divide even the experts. It is risky and perilous business to send men to prison on such provocative issues, which confuse people and create irreconcilable differences even among the judges who sentence them or approve their convictions.

In these criminal cases dealing with obscenity, we leave people confused and in the dark as to whether they are or are not criminals. Criminal laws must give fair warning; and a person receives no real warning when he crosses the line between the lawful and the unlawful, under the Texas statute [12] or under the standard approved by the Court.

Where constitutional rights may be infringed, *Winters* v. *New York*, 333 U. S. 507, should be our guide. There an "obscene" magazine was defined to include those which "massed" stories of bloodshed and lust to incite crimes. *Id.*, at 513. We held that standard to be too vague to satisfy constitutional standards.[13]

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.

[12] Even the police have no guidance as to the kind of books to be seized. See n. 1, *supra*.

[13] Even where First Amendment or other constitutional rights are not involved, no one may be required "to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. Chief Justice Marshall said in *United States* v. *Wiltberger*, 5 Wheat. 76, 105, that in determining the certainty needed in a penal law for its validity the "probability" that the legislature may have desired to include a species of activity within an Act is not enough. And see *United States* v. *Lacher*, 134 U. S. 624, 628; *Pierce* v. *United States*, 314 U. S. 306.

> The vagueness may be from uncertainty in regard to persons within the scope of the act, . . . or in regard to the applicable tests to ascertain guilt." *Id.*, at 515–516.

And see *Wright* v. *Georgia*, 373 U. S. 284, 292; *Smith* v. *California*, 361 U. S. 147, 151; *United States* v. *Harriss*, 347 U. S. 612; *Beauharnais* v. *Illinois*, 343 U. S. 250, 264; *Williams* v. *United States*, 341 U. S. 97; *Cantwell* v. *Connecticut*, 310 U. S. 296.

My view, however, is that any regime of censorship over literature whether expressed in a criminal statute [14] or an administrative [15] procedure is unconstitutional by reason of the command of the First Amendment.

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[14] See MR. JUSTICE BLACK'S opinion in *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684, 690 (concurring).

See my opinions in *Roth* v. *United States*, 354 U. S. 476, 508 (dissenting); *Smith* v. *California*, 361 U. S. 147, 167 (concurring); *Ginzburg* v. *United States*, 383 U. S. 463, 482 (dissenting).

[15] See MR. JUSTICE BLACK'S separate opinion in *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 213.

BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 83. Argued April 30, 1970—Reargued November 17, 1970—Decided February 23, 1971

Appellees, indicted for violating the Massachusetts obscenity law as a result of exhibiting the film, "I am Curious (Yellow)," brought this action in the federal district court for an injunction against the enforcement of the statute and for a declaration of its unconstitutionality. A three-judge District Court, holding that appellees might be irreparably injured if unable to show the film, granted injunctive relief. *Held:* The District Court made no finding that the threat to appellees' federally protected rights "[could] not be eliminated by [their] defense against a single criminal prosecution," to meet the great and immediate irreparable injury requirement of *Younger* v. *Harris, ante,* p. 37, at 46, before a federal injunction of state criminal proceedings can properly issue. The judgment is therefore vacated and the case remanded for reconsideration in the light of *Younger, supra,* and *Samuels* v. *Mackell, ante,* p. 66.

306 F. Supp. 1363, vacated and remanded.

Robert H. Quinn, Attorney General of Massachusetts, *pro se,* reargued the cause for appellants. With him on the brief were *Joseph J. Hurley,* First Assistant Attorney General, *John J. Irwin, Jr., Ruth I. Abrams,* and *Lawrence P. Cohen,* Assistant Attorneys General, *Garrett H. Byrne, pro se,* and *Theodore A. Glynn, Jr.*

Nathan Lewin and *Alan M. Dershowitz* argued the cause for appellees on the reargument. *Edward de Grazia* and *Mr. Lewin* argued the cause for appellees on the original argument. With them on the brief was *Herbert S. Swartz.*

Peter L. Strauss argued the cause for the United States on the reargument as *amicus curiae* urging reversal. *Francis X. Beytagh, Jr.*, argued the cause for the United States on the original argument. With them on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley.*

Briefs of *amici curiae* urging affirmance were filed by *Stanley Fleishman* and *Sam Rosenwein* for National General Corp. et al., and by *Thomas R. Asher, Michael Schneiderman,* and *Melvin L. Wulf* for the American Civil Liberties Union et al.

PER CURIAM.

This is an appeal from the order of a three-judge court granting a preliminary injunction against any civil or criminal proceedings in state courts against the appellees. Appellant Byrne is the district attorney of Suffolk County, Massachusetts. The appellees own and operate a motion picture theater in Boston. As a result of exhibiting the film entitled "I am Curious (Yellow)" at their theater, appellees were charged by District Attorney Byrne with violating Massachusetts General Laws, Chapter 272, § 28A, which prohibits the possession of obscene films for the purpose of exhibition.[1]

After the filing of the original state indictments against them appellees brought the present action in federal

[1] Mass. Gen. Laws, c. 272, § 28A, provides:

"Importing, printing, distributing or possessing obscene things.

"Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

court.[2] They sought an injunction against both pending and future prosecutions under the Massachusetts obscenity law, and a declaration that the state obscenity law was unconstitutional on its face and as applied.[3] The

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[2] While the federal action was pending those indictments were dismissed for defects under Massachusetts law and new state indictments were returned. Under these circumstances we treat the state prosecution as pending at the time the federal suit was initiated.

[3] The appellees' prayer for relief, as amended, read as follows:

"Wherefore, plaintiffs pray:

"(1) That a preliminary injunction and a permanent injunction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture 'I Am Curious (Yellow)' without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

"(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture 'I Am Curious (Yellow)' seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

"(3) That this Court order a preliminary injunction, and that following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein in the said six actions now pending in the Suffolk Superior Court (Docket numbers 42587, through 42592) until such time as the said Sections 32 and 28A of Massachusetts General Laws, Chapter 272, have been appropriately altered and amended.

"(4) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture 'I Am Curious (Yellow),' or any further prosecution in this jurisdiction of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene.' Plaintiffs contend and pray herein on the basis that any such prosecution is 'without hope of success.' . . .

"(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional

three-judge District Court held that appellees had a probability of success in having the statute declared unconstitutional, that abstention would be improper, and that appellees might suffer irreparable injury if they were unable to show the film. The three-judge court, one judge dissenting, therefore granted a preliminary injunction, forbidding the initiation of any future prosecutions or the execution of the sentence imposed in the state proceedings then pending. 306 F. Supp. 1363 (1969). The district attorney appealed. We granted a stay of the district court order, 396 U. S. 976 (1969), and subsequently noted probable jurisdiction, 397 U. S. 985 (1970).

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of [*sic*] its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U. S. C., Section 2201.

"(6) That this Court declare and say that the motion picture 'I Am Curious (Yellow)' is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York*, 386 U. S. 767 (1967). . . .

"(7) That this Court restrain any future prosecutions of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene' within the terms of Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could 'know the work to be obscene.'

"(8) That any further prosecutions of the motion picture 'I Am Curious (Yellow)' on the grounds that it is 'allegedly obscene' and therefore violative of Section 28A of Chapter 272 of Massachusetts General Laws be restrained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup* v. *New York, supra,* are that—(1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a 'pandering' manner.

"(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture 'I Am Curious (Yellow)' on the grounds that any prosecution is 'without hope of success' . . . .

"(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law."

In discussing the subject of irreparable injury, the court said:

> "We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See* Dombrowski v. Pfister, 1965, 380 U. S. 479, 486–489." 306 F. Supp., at 1367.

There was, however, no finding by the District Court that the threat to appellees' federally protected rights is "one that cannot be eliminated by [their] defense against a single criminal prosecution." *Younger* v. *Harris, ante,* p. 37, at 46. Because the District Court, in considering the propriety of injunctive and declaratory relief in this case, was without the guidance provided today by our decisions in *Younger* v. *Harris, supra,* and *Samuels* v. *Mackell, ante,* p. 66, we vacate the judgment below and remand for reconsideration in light of those decisions.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal.

[For concurring opinion of MR. JUSTICE STEWART, see *ante,* p. 54.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The injunction appealed from issued December 6, 1969, after appellees' convictions in state court on November 12,

1969, of exhibiting an obscene film in violation of state law. In the absence of any showing of bad faith or harassment, appellees were therefore obliged to pursue their constitutional defenses on appeal from the convictions to the state appellate court, and the Federal District Court erred in enjoining appellants from interfering with future showings of the film. *Freedman* v. *Maryland,* 380 U. S. 51, 60 (1965), limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination of the question of the film's alleged obscenity. See also *Lee Art Theater* v. *Virginia,* 392 U. S. 636 (1968). But there was no interference from July through November; appellant Byrne honored a stipulation made July 15 in federal court not to seize the film or interfere with its exhibition pending the outcome of the trial. Byrne withdrew from the stipulation and threatened to move against further exhibition of the film only after the convictions were obtained. Clearly, he was not required to continue to stay his hand pending the outcome of appeals from the convictions; *Freedman* was satisfied by a "prompt judicial decision *by the trial court," Teitel Film Corp.* v. *Cusack,* 390 U. S. 139, 142 (1968) (emphasis supplied); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 690 n. 22 (1968). Rather than remand I would therefore reverse the judgment of the District Court for the reasons stated in my opinion in *Perez* v. *Ledesma, ante,* p. 93.

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HARRIS *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 206. Argued December 17, 1970—Decided February 24, 1971

Statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U. S. 436, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. See *Walder* v. *United States*, 347 U. S. 62. Pp. 223–226.

25 N. Y. 2d 175, 250 N. E. 2d 349, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., dissented. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 226.

Joel Martin Aurnou argued the cause and filed a brief for petitioner.

James J. Duggan argued the cause for respondent. With him on the brief was *Carl A. Vergari.*

Sybil H. Landau argued the cause for the District Attorney of New York County as *amicus curiae* urging affirmance. With her on the brief were *Frank S. Hogan, pro se,* and *Michael R. Juviler.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an under-

cover police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty on the second count of the indictment.[1] The New York Court of Appeals affirmed in a *per curiam* opinion, 25 N. Y. 2d 175, 250 N. E. 2d 349 (1969).

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner,

[1] No agreement was reached as to the first count. That count was later dropped by the State.

conceding that they were inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

In *Walder* v. *United States*, 347 U. S. 62 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
>
> "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U. S., at 65.

It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder.* Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox,* 396 U. S. 77 (1969); cf. *Dennis* v. *United States,* 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.[2] Had

[2] If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a "fruit" of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution. Compare *Killough* v. *United States,* 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962).

inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

It is conceded that the question-and-answer statement used to impeach petitioner's direct testimony was, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitution also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in *Walder* v. *United States*, 347 U. S. 62 (1954), is not, as the Court today holds, dispositive to the contrary. Rather, that case supports my conclusion.

The State's case against Harris depended upon the jury's belief of the testimony of the undercover agent that petitioner "sold" the officer heroin on January 4 and again on January 6. Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12.

The statement contradicted petitioner's direct testimony as to the events of both days. The statement's version of the events on January 4 was that the officer had used petitioner as a middleman to buy some heroin from a third person with money furnished by the officer. The version of the events on January 6 was that petitioner had again acted for the officer in buying two bags of heroin from a third person for which petitioner received $12 and a part of the heroin. Thus, it is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters but on matters directly related to the crimes for which he was on trial.[1]

Walder v. *United States* was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In *Walder* the evidence was used to impeach the accused's testimony on matters *collateral* to the crime charged. Walder had been indicted in 1950 for purchasing and possessing heroin. When his motion to suppress use of the narcotics as illegally seized was granted, the Government dismissed the prosecution. Two years later Walder was indicted for another narcotics violation completely unrelated to the 1950 one. Testifying in his own defense, he said on direct examination that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier. The Government was then permitted to introduce the testimony of one of the officers involved in the 1950 seizure, that when he had raided Walder's home at that time he had seized narcotics there.

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[1] The trial transcript shows that petitioner testified that he remembered making a statement on January 7; that he remembered a few of the questions and answers; but that he did not "remember giving too many answers." When asked about his bad memory, petitioner, who had testified that he was a heroin addict, stated that "my joints was down and I needed drugs."

The Court held that on facts where "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," 347 U. S., at 65, the exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383 (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted, that petitioner had in fact possessed narcotics two years before. The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a "denial of complicity in the crimes of which he was charged," that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said:

> "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U. S., at 65.

From this recital of facts it is clear that the evidence used for impeachment in *Walder* was related to the earlier 1950 prosecution and had no direct bearing on "the elements of the case" being tried in 1952. The evidence tended solely to impeach the credibility of the defendant's direct testimony that he had never in his life possessed heroin. But that evidence was completely unrelated to the indictment on trial and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner.

While *Walder* did not identify the constitutional specifics that guarantee "a defendant the fullest opportunity to meet the accusation against him . . . [and permit him to] be free to deny all the elements of the case against him," in my view *Miranda* v. *Arizona*, 384 U. S. 436 (1966), identified the Fifth Amendment's privilege against self-incrimination as one of those specifics.[2]

[2] Three of the five judges of the Appellate Division in this case agreed that the State's use of petitioner's illegally obtained statement was an error of constitutional dimension. *People* v. *Harris*, 31 App. Div. 2d 828, 298 N. Y. S. 2d 245 (1969). However, one of the three held that the error did not play a meaningful role in the case and was therefore harmless under our decision in *Chapman* v. *California*, 386 U. S. 18 (1967). He therefore joined in affirming the conviction with the two judges who were of the view that there was no constitutional question involved. 31 App. Div. 2d, at 830, 298 N. Y. S. 2d, at 249. I disagree that the error was harmless and subscribe to the reasoning of the dissenting judges, *id.*, at 831–832, 298 N. Y. S. 2d at 250:

"Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was 'harmless beyond a reasonable doubt' (*Chapman* v. *California*, 386 U. S. 18, 24). An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (*Fahy* v. *Connecticut*, 375 U. S. 85, 86–87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (*Chapman* v. *California, supra*). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the January 4 charge (cf. *Anderson* v. *Nelson*, 390 U. S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted."

The Court of Appeals affirmed *per curiam* on the authority of its earlier opinion in *People* v. *Kulis*, 18 N. Y. 2d 318, 221 N. E. 2d 541 (1966). Chief Judge Fuld and Judge Keating dissented in *Kulis* on the ground that *Miranda* precluded use of the statement for impeachment purposes, 18 N. Y. 2d, at 323, 221 N. E. 2d, at 542.

That privilege has been extended against the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). It is fulfilled only when an accused is guaranteed the right "to remain silent unless he chooses to speak in the *unfettered* exercise of his own will," *id.*, at 8 (emphasis added). The choice of whether to testify in one's own defense must therefore be "unfettered," since that choice is an exercise of the constitutional privilege, *Griffin* v. *California*, 380 U. S. 609 (1965). *Griffin* held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it "fetters" that choice—"[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614. For precisely the same reason the constitutional guarantee forbids the prosecution to use a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly." *Ibid.* Thus, the accused is denied an "unfettered" choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.[3] We settled this proposition in *Miranda* where we said:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner . . . . [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for*

[3] It is therefore unnecessary for me to consider petitioner's argument that *Miranda* has overruled the narrow exception of *Walder* admitting impeaching evidence on collateral matters.

> *any other statement.*" 384 U. S., at 476–477 (emphasis added).

This language completely disposes of any distinction between statements used on direct as opposed to cross-examination.[4] "An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn." *People* v. *Kulis,* 18 N. Y. 2d 318, 324, 221 N. E. 2d 541, 543 (1966) (dissenting opinion).

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system, *Miranda* v. *Arizona,* 384 U. S., at 460, is the privilege against self-incrimination, which for

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[4] Six federal courts of appeals and appellate courts of 14 States have reached the same result. *United States* v. *Fox,* 403 F. 2d 97 (CA2 1968); *United States* v. *Pinto,* 394 F. 2d 470 (CA3 1968); *Breedlove* v. *Beto,* 404 F. 2d 1019 (CA5 1968); *Groshart* v. *United States,* 392 F. 2d 172 (CA9 1968); *Blair* v. *United States,* 130 U. S. App. D. C. 322, 401 F. 2d 387 (1968); *Wheeler* v. *United States,* 382 F. 2d 998 (CA10 1967); *People* v. *Barry,* 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (1965), cert. denied, 386 U. S. 1024 (1967); *Velarde* v. *People,* 171 Colo. 261, 466 P. 2d 919 (1970); *State* v. *Galasso,* 217 So. 2d 326 (Fla. 1968); *People* v. *Luna,* 37 Ill. 2d 299, 226 N. E. 2d 586 (1967); *Franklin* v. *State,* 6 Md. App. 572, 252 A. 2d 487 (1969); *People* v. *Wilson,* 20 Mich. App. 410, 174 N. W. 2d 79 (1969); *State* v. *Turnbow,* 67 N. M. 241, 354 P. 2d 533 (1960); *State* v. *Catrett,* 276 N. C. 86, 171 S. E. 2d 398 (1970); *State* v. *Brewton,* 247 Ore. 241, 422 P. 2d 581, cert. denied, 387 U. S. 943 (1967); *Commonwealth* v. *Padgett,* 428 Pa. 229, 237 A. 2d 209 (1968); *Spann* v. *State,* 448 S. W. 2d 128 (Tex. Cr. App. 1969); *Cardwell* v. *Commonwealth,* 209 Va. 412, 164 S. E. 2d 699 (1968); *Gaertner* v. *State,* 35 Wis. 2d 159, 150 N. W. 2d 370 (1967); see also *Kelly* v. *King,* 196 So. 2d 525 (Miss. 1967). Only three state appellate courts have agreed with New York. *State* v. *Kimbrough,* 109 N. J. Super. 57, 262 A. 2d 232 (1970); *State* v. *Butler,* 19 Ohio St. 2d 55, 249 N. E. 2d 818 (1969); *State* v. *Grant,* 77 Wash. 2d 47, 459 P. 2d 639 (1969).

that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, "we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Ibid.* These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio,* 367 U. S. 643, 659 (1961). Thus, even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

Syllabus

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL–CIO *v.* HARDEMAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 123. Argued December 16, 1970—Decided February 24, 1971

Respondent, who was a member of petitioner union, assaulted the business manager of his local for allegedly failing to refer him for a job, and was tried for this conduct by the union on charges of (1) creating dissension and working against the interest and harmony of the local, which carried a penalty of expulsion, and (2) threatening and using force to restrain an officer from discharging the duties of his union office, punishable "as warranted by the offense." He was found "guilty as charged" and expelled for an indefinite period. He later brought suit for damages alleging that petitioner violated § 101 (a)(5) of the Labor-Management Reporting and Disclosure Act by denying him a full and fair hearing in the disciplinary proceedings. The District Judge found that there was no transcript evidence to support the charge of creating dissension, and since the union tribunal had returned only a general verdict, held that respondent was deprived of the statutory "full and fair hearing." The Court of Appeals affirmed. Certiorari was granted to consider whether the subject matter was pre-empted because exclusively within the competence of the National Labor Relations Board, or, if not, whether the courts below had applied the proper standard of review. *Held:*

1. This action was within the competence of the District Court, as the issues here are whether respondent was denied rights guaranteed him by § 101 (a)(5), and, if so, his consequent entitlement, pursuant to the federal statute, to damages for that denial, questions that are irrelevant to the legality of conduct under the National Labor Relations Act. Pp. 237–241.

2. Section 101 (a)(5) does not empower courts to determine what conduct may warrant disciplinary action by a union against its members. Pp. 242–245.

3. The statutory "full and fair hearing" requires that the charging party provide some evidence at the hearing to support the

charges, and here there was sufficient evidence to support the finding that respondent assaulted the business manager as charged. Pp. 245–247.

420 F. 2d 485, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 247. DOUGLAS, J., filed a dissenting opinion, *post*, p. 247.

Louis Sherman argued the cause for petitioner. With him on the brief were *Elihu I. Leifer* and *Bernard Cushman*.

Robert E. McDonald, Jr., argued the cause and filed a brief for respondent.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, AFL–CIO, as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 102 of the Labor-Management Reporting and Disclosure Act (hereafter LMRDA) provides that a union member who charges that his union violated his rights under Title I of the Act may bring a civil action against the union in a district court of the United States for appropriate relief.[1] Respondent was expelled from

[1] Section 102 of the Act, 73 Stat. 523, 29 U. S. C. § 412, provides:

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

membership in petitioner union and brought this action under § 102 in the District Court for the Southern District of Alabama. He alleged that in expelling him the petitioner violated § 101 (a)(5) of the Act, 73 Stat. 523, 29 U. S. C. § 411 (a)(5) which provides: "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." A jury awarded respondent damages of $152,150. The Court of Appeals for the Fifth Circuit affirmed. 420 F. 2d 485 (1969).[2] We granted certiorari limited to the questions whether the subject matter of the suit was pre-empted because exclusively within the competence of the National Labor Relations Board and, if not pre-empted, whether the courts below had applied the proper standard of review to the union proceedings, 398 U. S. 926 (1970). We reverse.

The case arises out of events in the early part of October 1960. Respondent, George Hardeman, is a boilermaker. He was then a member of petitioner's Local Lodge 112. On October 3, he went to the union hiring hall to see Herman Wise, business manager of the Local Lodge and the official responsible for referring workmen for jobs. Hardeman had talked to a friend of his, an employer who had promised to ask for him by name for a job in the vicinity. He sought assurance from Wise that he would be referred for the job. When Wise refused to make a definite commitment, Hardeman threatened violence if no work was forthcoming in the next few days.

On October 4, Hardeman returned to the hiring hall

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[2] The affirmance was on the basis of *Boilermakers* v. *Braswell*, 388 F. 2d 193 (CA5 1968).

and waited for a referral. None was forthcoming. The next day, in his words, he "went to the hall . . . and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the Local or Wise or beat hell out of Wise, and then I made up my mind." When Wise came out of his office to go to a local jobsite, as required by his duties as business manager, Hardeman handed him a copy of a telegram asking for Hardeman by name. As Wise was reading the telegram, Hardeman began punching him in the face.

Hardeman was tried for this conduct on charges of creating dissension and working against the interest and harmony of the Local Lodge,[3] and of threatening and using force to restrain an officer of the Local Lodge from properly discharging the duties of his office.[4] The trial

[3] Article XIII, § 1, of the Subordinate Lodge Constitution then in force provided:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

[4] Article XII, § 1, of the Subordinate Lodge By-Laws then in force provided that: "It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office." Violators of Art. XII are to "be punished as warranted by the offense."

committee found him "guilty as charged," and the Local Lodge sustained the finding and voted his expulsion for an indefinite period. Internal union review of this action, instituted by Hardeman, modified neither the verdict nor the penalty. Five years later, Hardeman brought this suit alleging that petitioner violated § 101 (a)(5) by denying him a full and fair hearing in the union disciplinary proceedings.

I

We consider first the union's claim that the subject matter of this lawsuit is, in the first instance, within the exclusive competence of the National Labor Relations Board. The union argues that the gravamen of Hardeman's complaint—which did not seek reinstatement, but only damages for wrongful expulsion, consisting of loss of income, loss of pension and insurance rights, mental anguish and punitive damages—is discrimination against him in job referrals; that any such conduct on the part of the union is at the very least arguably an unfair labor practice under §§ 8 (b)(1)(A) and 8 (b)(2) of the National Labor Relations Act, 61 Stat. 141, as amended, 29 U. S. C. §§ 158 (b)(1)(A), 158 (b)(2); and that in such circumstances, "the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959); see *Local 100, Journeymen* v. *Borden*, 373 U. S. 690 (1963).

We think the union's argument is misdirected. Hardeman's complaint alleged that his expulsion was unlawful under § 101 (a)(5), and sought compensation for the consequences of the claimed wrongful expulsion. The critical issue presented by Hardeman's complaint was whether the union disciplinary proceedings had denied him a full and fair hearing within the meaning of § 101

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(a)(5)(C).[5] Unless he could establish this claim, Hardeman would be out of court. We hold that this claim was not within the exclusive competence of the National Labor Relations Board.

> " 'The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 63–64. The doctrine is based on the principle 'that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over,' *Far East Conference* v. *United States*, 342 U. S. 570, 574, and 'requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme,' *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 353." *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 684–685 (1965) (opinion of WHITE, J., announcing judgment).

Those factors suggesting that resort must be had to the administrative process are absent from the present case. The fairness of an internal union disciplinary proceeding is hardly a question beyond "the conventional ex-

[5] Hardeman's complaint did not claim that the charges were insufficiently specific, or that he did not have adequate time to prepare his defense in the union proceedings.

perience of judges," nor can it be said to raise issues "within the special competence" of the NLRB. See *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181, 193–194 (1967). As we noted in that case, the 86th Congress which enacted § 101 (a)(5) was "plainly of the view" that the protections embodied therein were new material in the body of federal labor law. 388 U. S., at 194. And that same Congress explicitly referred claims under § 101 (a)(5), not to the NLRB, but to the federal district courts. This is made explicit in the opening sentence of § 102: "Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." Of course, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Local 1625* v. *Schermerhorn*, 375 U. S. 96, 103 (1963). And in § 102 Congress has clearly indicated a purpose to refer claims regarding violation of § 101 (a)(5) to the district courts.

The union argues that Hardeman's suit should nevertheless have been dismissed because he did not seek an injunction restoring him to membership, and because he did seek damages for loss of employment said to be the consequence of his expulsion from the union. Taken together, these factors are said to shift the primary focus of the action from a review of Hardeman's expulsion to a review of alleged union discrimination against him in job referrals. Since this is a matter normally within the exclusive competence of the NLRB, see *Local 100, Journeymen* v. *Borden*, 373 U. S., at 695–696, the union argues that Hardeman's suit was beyond the competence of the district court.

The argument has no merit. To begin with, the language of § 102 does not appear to make the availability of damages turn upon whether an injunction is requested

as well. If anything, § 102 contemplates that damages will be the usual, and injunctions the extraordinary form of relief. Requiring that injunctive relief be sought as a precondition to damages would have little effect other than to force plaintiffs, as a matter of course, to add a few words to their complaints seeking an undesired injunction. We see no reason to import into § 102 so trivial a requirement.

Nor are our prior cases authority for such a result. We have repeatedly held, of course, that state law may not regulate conduct either protected or prohibited by the National Labor Relations Act. *Local 100, Journeymen* v. *Borden, supra; San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 244; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480–481 (1955); *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491 (1953). Where it has not been clear whether particular conduct is protected, prohibited, or left to state regulation by that Act, we have likewise required courts to stay their hand, for "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Building Trades Council* v. *Garmon, supra,* at 244–245. Nor may courts intervene in such matters even to apply the National Labor Relations Act, except by the normal mechanism of review of actions of the NLRB. For recognizing that "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law," *Garner* v. *Teamsters Union, supra,* at 490–491, Congress confided to the NLRB the primary power of interpretation and application of the Act. See *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1 (1957).

The present case, however, implicates none of the principles discussed above. There is no attempt, in this

lawsuit, to apply state law to matters pre-empted by federal authority. Nor is there an attempt to apply federal law of general application, which is limited in the particular circumstances by the National Labor Relations Act. Nor is there an attempt to have the District Court enforce the provisions of the National Labor Relations Act itself, without guidance from the NLRB. As we have said, the critical question in this action is whether Hardeman was afforded the rights guaranteed him by § 101 (a)(5) of the LMRDA. If he was denied them, Congress has said that he is entitled to damages for the consequences of that denial. Since these questions are irrelevant to the legality of conduct under the National Labor Relations Act, there is no danger of conflicting interpretation of its provisions. And since the law applied is federal law explicitly made applicable to such circumstances by Congress, there is no danger that state law may come in through the back door to regulate conduct that has been removed by Congress from state control. Accordingly, this action was within the competence of the District Court.[6]

II

Two charges were brought against Hardeman in the union disciplinary proceedings. He was charged with violation of Art. XIII, § 1, of the Subordinate Lodge Constitution, which forbids attempting to create dissension or working against the interest and harmony of the union, and carries a penalty of expulsion.[7] He was also charged with violation of Art. XII, § 1, of the Subordinate Lodge By-Laws, which forbids the threat

[6] See *Boilermakers* v. *Braswell*, 388 F. 2d, at 195–197. Accord, *Rekant* v. *Shochtay-Gasos Local 446*, 320 F. 2d 271, 273–275 (CA3 1963); *Parks* v. *Electrical Workers*, 314 F. 2d 886, 922–923 (CA4 1963); *Addison* v. *Machinists*, 300 F. 2d 863 (CA9 1962); *Machinists* v. *King*, 335 F. 2d 340, 346–347 (CA9 1964).

[7] See n. 3, *supra*.

or use of force against any officer of the union in order to prevent him from properly discharging the duties of his office; violation may be punished "as warranted by the offense." [8] Hardeman's conviction on both charges was upheld in internal union procedures for review.

The trial judge instructed the jury that "whether or not he [respondent] was rightfully or wrongfully discharged or expelled is a pure question of law for me to determine." He assumed, but did not decide, that the transcript of the union disciplinary hearing contained evidence adequate to support conviction of violating Art. XII. He held, however, that there was no evidence at all in the transcript of the union disciplinary proceedings to support the charge of violating Art. XIII. This holding appears to have been based on the Fifth Circuit's decision in *Boilermakers* v. *Braswell*, 388 F. 2d 193 (CA5 1968). There the Court of Appeals for the Fifth Circuit had reasoned that "penal provisions in union constitutions must be strictly construed," [9] and that as so construed Art. XIII was directed only to "threats to the union as an organization and to the effective carrying out of the union's aims," not to merely personal altercations. 388 F. 2d, at 199. Since the union tribunal had returned only a general verdict, and since one of the charges was thought to be supported by no evidence whatsoever, the trial judge held that Hardeman had been deprived of the full and fair hearing guaranteed by § 101 (a)(5).[10] The Court of Appeals affirmed, simply citing *Braswell*. 420 F. 2d 485 (CA5 1969).

We find nothing in either the language or the legislative history of § 101 (a)(5) that could justify such a sub-

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[8] See n. 4, *supra*.

[9] 388 F. 2d, at 198, quoting *Allen* v. *Theatrical Employees*, 338 F. 2d 309, 316 (CA5 1964).

[10] This reasoning was noted but not specifically endorsed in *Braswell*, 388 F. 2d, at 198.

stitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members. Section 101 (a)(5) began life as a floor amendment to S. 1555, the Kennedy-Ervin Bill, in the 86th Congress. As proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959, the amendment would have forbidden discipline of union members "except for breach of a published written rule of [the union]." 105 Cong. Rec. 6476, 6492–6493. But this language did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised "some rather vexing questions." *Id.*, at 6720. The Kuchel substitute, adopted the following day, deleted the requirement that charges be based upon a previously published, written union rule; it transformed Senator McClellan's amendment, in relevant part, into the present language of § 101 (a)(5). *Id.*, at 6720, 6727. As so amended, S. 1555 passed the Senate on April 25. *Id.*, at 6745. Identical language was adopted by the House, *id.*, at 15884, 15891, and appears in the statute as finally enacted.

The Congress understood that Senator Kuchel's amendment was intended to make substantive changes in Senator McClellan's proposal. Senator Kennedy had specifically objected to the McClellan amendment because

> "In the case of . . . the . . . official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against [an] officer or member guilty of bribery.
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> . . . . . .
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> "It seems to me that we can trust union officers to run their affairs better than that." *Id.*, at 6491.

Senator Kuchel described his substitute as merely providing "the usual reasonable constitutional basis" for union disciplinary proceedings: union members were to have "constitutionally reasonable notice and a reasonable hearing." *Id.*, at 6720. After the Kuchel amendment passed the Senate, Senator Goldwater explained it to the House Committee on Labor and Education as follows:

> "[T]he bill of rights in the Senate bill requires that the union member be served with written specific charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity." Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 4, p. 1595 (1959).

And Senator McClellan's testimony was to the same effect. *Id.*, pt. 5, pp. 2235–2236, 2251, 2285.

We think that this is sufficient to indicate that § 101 (a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members.[11] And if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written

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[11] State law, in many circumstances, may go further. See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L. J. 175 (1960). But Congress, which preserved state law remedies by § 103 of the LMRDA, 29 U. S. C. § 413, was well aware that even the broad language of Senator McClellan's original proposal was more limited in scope than much state law. See 105 Cong. Rec. 6481–6489.

rules in order to determine whether particular conduct falls within or without their scope.

Of course, § 101 (a)(5)(A) requires that a member subject to discipline be "served with written specific charges." These charges must be, in Senator McClellan's words, "specific enough to inform the accused member of the offense that he has allegedly committed." [12] Where, as here, the union's charges make reference to specific written provisions, § 101 (a)(5)(A) obviously empowers the federal courts to examine those provisions and determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense. But it gives courts no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all.

Respondent does not suggest, and we cannot discern, any possibility of prejudice in the present case. Although the notice of charges with which he was served does not appear as such in the record, the transcript of the union hearing indicates that the notice did not confine itself to a mere statement or citation of the written regulations that Hardeman was said to have violated: the notice appears to have contained a detailed statement of the facts relating to the fight that formed the basis for the disciplinary action.[13] Section 101 (a)(5) requires no more.

III

There remains only the question whether the evidence in the union disciplinary proceeding was sufficient to support the finding of guilt. Section 101 (a)(5)(C) of the

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[12] Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 5, p. 2285 (1959).

[13] See tr. of union disciplinary hearing 26–28, 76.

LMRDA guarantees union members a "full and fair" disciplinary hearing, and the parties and the lower federal courts are in full agreement that this guarantee requires the charging party to provide some evidence at the disciplinary hearing to support the charges made.[14] This is the proper standard of judicial review. We have repeatedly held that conviction on charges unsupported by any evidence is a denial of due process, *Thompson* v. *Louisville*, 362 U. S. 199, 206 (1960); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246–247 (1957); *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106 (1927); *Tisi* v. *Tod*, 264 U. S. 131, 133–134 (1924); and we feel that § 101 (a)(5)(C) may fairly be said to import a similar requirement into union disciplinary proceedings. Senator Kuchel, who first introduced the provision, characterized it on the Senate floor as requiring the "usual reasonable constitutional basis" for disciplinary action, 105 Cong. Rec. 6720, and any lesser standard would make useless § 101 (a)(5)(A)'s requirement of written, specific charges. A stricter standard, on the other hand, would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record.[15]

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[14] *Vars* v. *Boilermakers*, 320 F. 2d 576 (CA2 1963); *Rosen* v. *Painters*, 198 F. Supp. 46 (SDNY 1961), appeal dismissed, 326 F. 2d 400 (CA2 1964); *Lewis* v. *American Federation of State Employees*, 407 F. 2d 1185 (CA3 1969); *Boilermakers* v. *Braswell*, 388 F. 2d 193 (CA5 1968); *Burke* v. *Boilermakers*, 417 F. 2d 1063 (CA9 1969), affirming 302 F. Supp. 1345 (ND Cal. 1967).

[15] Although a transcript was made of the union proceedings in the present case, we have no reason to believe that this is a universal practice.

Applying this standard to the present case, we think there is no question that the charges were adequately supported. Respondent was charged with having attacked Wise without warning, and with continuing to beat him for some time. Wise so testified at the disciplinary hearing, and his testimony was fully corroborated by one other witness to the altercation. Even Hardeman, although he claimed he was thereafter held and beaten, admitted having struck the first blow. On such a record there is no question but that the charges were supported by "some evidence."

Reversed.

MR. JUSTICE WHITE, concurring.

The Court accurately states the holdings in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and like cases. But since the case before us "implicates none of the principles," *ante*, at 240, announced in those cases, neither is their continuing validity in their full sweep reaffirmed by today's opinion. On this basis, I join the Court's opinion.

I add an additional note. As the Court says, Hardeman's conviction on both charges against him was upheld. Expulsion was warranted on either count. The principle of *Stromberg* v. *California*, 283 U. S. 359 (1931), has no application in this situation. *Turner* v. *United States*, 396 U. S. 398, 420 (1970); *Barenblatt* v. *United States*, 360 U. S. 109, 115 (1959); *Claassen* v. *United States*, 142 U. S. 140, 146–147 (1891); see also cases cited in *Street* v. *New York*, 394 U. S. 576, 613 n. 2 (1969) (WHITE, J., dissenting).

MR. JUSTICE DOUGLAS, dissenting.

Section 102 of the Landrum-Griffin Act, 73 Stat. 523, 29 U. S. C. § 412, gives a member of a union the right

of civil redress in a federal district court against his union for infringement of his rights secured by the Act [1] at the same time § 103, 29 U. S. C. § 413, reserves to members any remedies they may have "under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws" of their unions. Moreover, § 101 (a)(5), 29 U. S. C. § 411 (a)(5),[2] provides that, except for nonpayment of dues, no member of a labor organization may be expelled or disciplined until there has been notice and a fair hearing.

The latter right is not exclusive, for as noted the Act gives members remedies for infringement of rights under the Act or under the constitution and bylaws of the union.

In the present case respondent went to one Wise, in charge of referral of men to jobs through the union hiring hall, and during the discussion which followed there was an altercation in which respondent hit Wise. For that assault respondent was fined in a criminal court. Thereupon Wise filed charges against respondent for violations

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[1] Section 102 provides:

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a *civil action in a district court of the United States* for such relief (including injunctions) as may be appropriate. Any such action against a labor organization *shall be brought in the district court of the United States* for the district where the alleged violation occurred, or where the principal office of such labor organization is located." (Emphasis added.)

[2] Section 101 (a)(5) provides:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

of one provision of the union's bylaws [3] and one provision of the union's constitution.[4]

At a hearing before a committee of the local lodge which Hardeman attended it was determined that respondent was "guilty as charged." That determination was approved by the membership of the local which voted *to suspend him from membership "indefinitely."*

Respondent appealed to the International Union, petitioner here. Acting through its president and its international executive council it denied the appeal.

Thereafter respondent sued International for consequential and punitive damages. The case was tried by

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[3] Article XII of the bylaws provides:

"In addition to the offenses and penalties set out in the applicable provisions of the International and Subordinate Lodge Constitution, the following offenses and penalties shall be observed in this Subordinate Lodge, and any member who violates same shall, if found guilty after proper hearing as provided herein, be punished as warranted by the offense.

"(1) It shall be a violation of these By-Laws for any member through the use of force or violence or the threat of the use of force or violence to restrain, coerce or intimidate, or attempt to restrain, coerce or intimidate any official of this International Brotherhood or Subordinate Lodge to prevent or attempt to prevent him from properly discharging the duties of his office."

[4] Article XIII, § 1, of the constitution provides:

"Any member who endeavors to create dissension among the members; or who works against the interest and harmony of the International Brotherhood or of any District or Subordinate Lodge; who advocates or encourages a division of the funds, or the dissolution of any District or Subordinate Lodge, or the separation of any District or Subordinate Lodge from the International Brotherhood; who supports or becomes a member of any dual or subversive organization which shall be hostile to the International Brotherhood or to any of its Subordinate Lodges, or which is antagonistic to the principles and purposes of the International Brotherhood, shall upon conviction thereof be punished by expulsion from the International Brotherhood."

a jury which returned a verdict of $152,150 and the Court of Appeals affirmed. 420 F. 2d 485.

There was evidence that there was a grudge between Wise and respondent, out of which the fist fight occurred. And there was evidence that the force or violence was an attempt to coerce Wise "to prevent him from properly discharging the duties of his office" within a rational meaning of the bylaws of the union.[5] And the District Court so charged the jury. But, as the District Court ruled, there was no evidence that respondent endeavored "to create dissension among the members" or to work against the "interest and harmony" of the union within the meaning of Art. XIII of the constitution.[6]

I agree that a court does not sit in review of a union as it does of an administrative agency. But by reason of § 101 (a)(5) judicial oversight is much more than procedural; it provides in subsection (C) for "a full and fair hearing." Even if every conceivable procedural guarantee is provided, a hearing is not "fair" when all substantive rights are stripped away to reach a preordained result. If there is to be a "fair hearing" there must, I submit, be some evidence directed to the charges to support the conclusion.

Membership in a union may be the key to livelihood itself.[7] Without membership, the member may be cast into the outer darkness, so far as employment is concerned. Just as this Court concluded Congress did not authorize exclusive bargaining agents to make invidious discriminations, *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, it is unthinkable to me that Congress in designing § 101 (a)(5) gave unions the authority to expel

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[5] See n. 3, *supra*.

[6] See n. 4, *supra*.

[7] Hardeman testified at trial that following the loss of his union card he was unable to work in the boilermaker's trade beyond one job lasting five days.

members for such reasons as they chose. For courts to lend their hand to such oppressive practices is to put the judicial imprimatur on the union's utter disregard of due process to reach its own ends.

In *Boilermakers* v. *Braswell,* arising out of the same incident, the Court of Appeals followed that reasoning. 388 F. 2d 193, 199. It said:

> "[T]he act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges. Article XIII, Section 1 of the constitution on its face is directed at threats to the union as an organization and to the effective carrying out of the union's aims. Braswell's fist was not such a threat."

As stated by a student in this area: "[H]ow can there be a 'full and fair hearing' when it results in a verdict which mocks the evidence?" [8] Of course, the reviewing court does not give a hearing *de novo;* nor does it review the merits of the dispute. But it does sit to check intemperate use of union power; and if it is to discharge its duties, it must conclude that there is some evidence to sustain the charge. This is the view of the Second, Third, and Fifth Circuits, *Vars* v. *Boilermakers,* 320 F. 2d 576; *Kelsey* v. *Philadelphia Local No. 8,* 419 F. 2d 491; *Boilermakers* v. *Braswell,* 388 F. 2d 193, and I would adopt it as the controlling legal principle.

Violation of Art. XIII of the constitution carries with it automatic expulsion. Violation of the bylaws would carry punishment "as warranted by the offense," which, I assume, would justify expulsion. For respondent to use force against Wise who was in charge of referral of men to jobs through the union hiring hall

[8] Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 N. Y. U. L. Rev. 227, 251.

may well have been an attempt "to prevent him from properly discharging the duties of his office" within the meaning of Art. XII. But how an isolated fist fight could "create dissension" among union members or work against the union's interests in the other ways described in Art. XIII remains a mystery.

The finding of the union was the general one "guilty as charged." Under which provision—constitution or by-law—it suspended him indefinitely is not made clear. Perhaps it was under only one or perhaps under both provisions.

In that posture the case is in the category of *Stromberg* v. *California*, 283 U. S. 359, where a conviction might have been valid under one charge but would have been invalid under the other; but the verdict being a general one, it was impossible to tell under which he was convicted. It is as much a denial of due process to sustain a conviction merely because a verdict of guilty *might* have been rendered on a valid ground as it is to send an accused to prison following conviction of a charge on which he was never tried. *Cole* v. *Arkansas*, 333 U. S. 196, 201. It was in that tradition that the District Court charged the jury: [9]

> "Now, that is all they charged him with were those two sections and there is nothing in this record that would justify a finding of guilty under those sections. All of it is about the fight.

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[9] The Court of Appeals affirmed summarily on the basis of *Boilermakers* v. *Braswell*, 388 F. 2d 193, a case arising out of the same factual situation, as Braswell also assaulted Wise at the time respondent assaulted him. In *Braswell*, the Court of Appeals found that the blow was "struck in anger, and nothing more." Hence it held that Braswell's fist was not used as an effort to create dissension among members within the meaning of Art. XIII of the constitution. By its summary affirmance in the present case it presumably reached the same conclusion in the present case.

> "I am telling you, as a matter of law, that under the proof, the finding which resulted in *his being expelled,* cannot legally stand and therefore he was wrongfully expelled." (Emphasis added.)

Since the finding of "guilty as charged" had that infirmity, it could not stand; and the jury was justified in assessing damages for an unlawful expulsion.[10]

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[10] It is urged that since respondent's complaint arose out of his effort to obtain employment, his relief may be sought only from the National Labor Relations Board. See *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236; *Local 100, Journeymen* v. *Borden,* 373 U. S. 690; *Local 207* v. *Perko,* 373 U. S. 701. The argument is that the expulsion of respondent was "arguably" an unfair labor practice and that exclusive jurisdiction therefore was with the Board. But *Garmon* prevents conflicts between federal and state policy. If there is a conflict in the present case, it is between two federal agencies; and Congress has declared in § 102 of the Landrum-Griffin Act that the federal courts, not the Board, are to have the primary role.

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UNITED STATES *v.* WELLER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 77. Argued December 10, 1970—Decided February 24, 1971

Appellee, who claimed conscientious objector status, was refused representation by his attorney at the time of his personal appearance before his draft board on the basis of a Selective Service regulation prohibiting such representation. Subsequently indicted for refusing to submit to induction, appellee filed a motion to dismiss, contending that the denial of counsel had deprived him of due process. The District Court granted appellee's motion on the ground that the regulation was not authorized by the Military Selective Service Act of 1967. The United States filed a notice of appeal to this Court, but, after reconsidering and concluding that this Court lacked jurisdiction to entertain its direct appeal from the District Court's order, the United States moved for a remand to the Court of Appeals. Appellee contends that the "construction of the statute" dismissal provision or the "motion in bar" provision of the Criminal Appeals Act gives this Court jurisdiction of the appeal. *Held:*

1. This Court has no jurisdiction of the appeal under the "construction of the statute" provision since the interrelation of the regulation and the statute fell short of that required for the dismissal to have been based upon the construction of the statute. *United States* v. *Mersky*, 361 U. S. 431, distinguished. Pp. 257–259.

2. The "motion in bar" provision applies only when a defendant, while not denying the commission of the offense, claims that an extraneous factor forecloses prosecution. That provision is inapplicable here since appellee contends that his refusal to submit to induction was not a crime because of the denial of counsel by his draft board. Pp. 259–261.

309 F. Supp. 50, remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 261.

James van R. Springer argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, Philip R. Monahan,* and *Roger A. Pauley.*

Marvin M. Karpatkin argued the cause for appellee. With him on the brief were *Michael N. Pollet, Melvin L. Wulf,* and *Rhoda H. Karpatkin.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon once again to construe the elusive provisions of the Criminal Appeals Act, 18 U. S. C. § 3731.[1] Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by the appellant, the United States. The appellee, on the other hand, insists the case is properly here.

A grand jury in the United States District Court for the Northern District of California indicted the appellee for refusing to submit to induction into the Armed Forces, a violation of 50 U. S. C. App. § 462 (a) (1964 ed.,

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[1] The end of our problems with this Act is finally in sight. The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890, amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This Court's appellate jurisdiction of Government appeals in federal criminal cases has thus been eliminated. Pending cases, however, are not affected, since subsection (b) of the amending section provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971. The appellee in this case was indicted on January 15, 1969.

Supp. V).[2] In the Selective Service proceedings leading up to his induction notice, the appellee sought conscientious objector status. He specifically requested that his lawyer be allowed to accompany him at the time of his personal appearance before his local board, but the board, relying on 32 CFR § 1624.1 (b), denied the request and conducted the personal appearance without the appellee's counsel present.[3] Subsequently, the board declined to reopen the appellee's I–A classification, and the appellee unsuccessfully exhausted administrative review. His order to report for induction, his refusal to submit, and this prosecution followed.

The appellee moved before trial to dismiss his indictment on the ground, among others, that the denial of counsel at the time of his personal appearance before the board deprived him of due process of law under the Fifth Amendment. The District Court did not squarely decide this constitutional claim, but granted the motion to dismiss on the ground that the regulation prohibiting representation by counsel at a registrant's personal appearance was not authorized by the Military Selective Service Act. 309 F. Supp. 50. The court relied primarily upon *Greene* v. *McElroy*, 360 U. S. 474, in which our opinion underscored "the Court's concern that traditional forms of fair procedure not be restricted by

[2] Military Selective Service Act of 1967, § 12 (a), 50 U. S. C. App. § 462 (a) (1964 ed., Supp. V), provides in pertinent part:

"[A]ny person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

[3] 32 CFR § 1624.1 (b) (1970) provides in pertinent part:

"[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel."

implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." 360 U. S., at 508. Viewing the personal appearance as "a critical stage of an administrative process at which substantial rights are adjudicated," 309 F. Supp., at 51, the District Court found the various provisions of the Selective Service Act conferring rulemaking power on the Executive insufficient to authorize a regulation denying counsel at local board hearings.[4]

The United States filed a notice of appeal to this Court. Subsequently, the Government reconsidered its position and concluded that this Court lacked jurisdiction over the appeal. Accordingly, the Solicitor General filed a motion asking us to remand the case to the United States Court of Appeals for the Ninth Circuit. We postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. 397 U. S. 985. We now conclude that this appeal is not properly here and, pursuant to the provisions of the Criminal Appeals Act, remand the case to the Court of Appeals.[5]

The appellee urges that we have jurisdiction under either of two sections of the Act, one relating to dis-

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[4] The District Court cited Military Selective Service Act § 10 (b)(3), 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. V), and § 1 (c) of the Act, 50 U. S. C. App. § 451 (c). See also Military Selective Service Act §§ 5 (a)(1), 10 (b)(1), 50 U. S. C. App. §§ 455 (a)(1) (1964 ed., Supp. V), 460 (b)(1).

[5] See 18 U. S. C. § 3731:

. . . . . .

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance."

missal of an indictment based on the construction of the statute on which the indictment is founded and the other to motions in bar.[6] Considering first the "construction of the statute" provision, the controlling precedent is this Court's decision in *United States* v. *Mersky*, 361 U. S. 431. In that case, as in this one, there were in issue both a statute and a regulation promulgated pursuant to it. In finding jurisdiction in *Mersky*, however, the Court noted that "neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other. . . . When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve the construction of the statute." 361 U. S., at 438.[7]

The relation between the Selective Service Act and the regulation forbidding representation by counsel before local boards is wholly different from the situation in *Mersky*. The regulation is not at all "called for by the statute itself," 361 U. S., at 438. Indeed, so independent are the statute and the regulation that it would be entirely possible for a regulation covering the same subject matter to provide exactly the reverse of what the present regulation requires. It cannot be said here

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[6] *Ibid.*:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

[7] The dissenting opinions would have found jurisdiction wanting in *Mersky*. 361 U. S., at 444, 453.

that "the construction of one necessarily involves the construction of the other." Since this statute and this regulation fall so far short of being "inextricably intertwined," we conclude that the dismissal of the appellee's indictment was not "based upon the . . . construction of the statute." [8]

We turn, accordingly, to the "motion in bar" provision of the Criminal Appeals Act. Two preliminary observations are necessary. First, a "motion in bar" must be taken to mean whatever was meant by a "special plea in bar" in the Act as originally passed in 1907.[9] Second, this Court has never settled on a definitive interpretation of what constitutes a "motion in bar." [10]

During its debates on the Criminal Appeals Act in 1907, Congress paid relatively little attention to the "special plea in bar" section of the Act. The clearest statement of its meaning was given by one of the bill's cosponsors, Senator Patterson:

> "A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged;

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[8] It is suggested in dissent that we have jurisdiction because of the language in 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. V) conferring upon local boards the power "to hear and determine" claims for exemption and deferment from military service. The record does not indicate that this statutory language was mentioned by the appellee in the District Court, and the court did not rely upon the "hear and determine" clause in dismissing the indictment. The theory of the dissent was not urged before this Court, perhaps because the parties realized that it can hardly be said that a dismissal of an indictment was "based upon" a construction of a statutory provision that the District Court never even considered.

[9] *United States* v. *Sisson*, 399 U. S. 267, 292–293, n. 22; Note 4 of Advisory Committee to Fed. Rule Crim. Proc. 54 (c), reprinted following Fed. Rule Crim. Proc. 54, 18 U. S. C. App.

[10] *United States* v. *Sisson*, 399 U. S., at 300 and nn. 53–54.

> it is for some outside matter; yet it may have been connected with the case." [11]

The tenor of this definition accords with traditional usage, for at common law the most usual special plea in bar took the form of confession and avoidance. 1 J. Chitty, Treatise on Pleading and Parties to Actions *551–552 (16th Am. ed. 1883). In criminal cases the most common special pleas in bar presented claims of double jeopardy or pardon, 2 J. Bishop, New Criminal Procedure § 742 (2d ed. 1913), and sometimes the statute of limitations, *id.*, at § 799 (5).

A characteristic common to all these definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged and that the acts were a crime. Rather, it claimed that nevertheless he could not be prosecuted for his crime because of some extraneous factor. A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.

Our decisions are consistent with this reading of the "motion in bar" provision. In early cases under the section, the most familiar plea in bar interposed the statute of limitations. *E. g., United States* v. *Goldman,* 277 U. S. 229, 236–237; *United States* v. *Rabinowich,* 238 U. S. 78, 83–84. In other cases defendants have claimed immunity because of prior self-incriminatory testimony or a statutory grant of immunity. *United States* v. *Blue,* 384 U. S. 251; *United States* v. *Hoffman,* 335 U. S. 77, 78; *United States* v. *Monia,* 317 U. S. 424. See also *United States* v. *Ewell,* 383 U. S. 116 (speedy trial); *United States* v. *Hark,* 320 U. S. 531 (governing regulation revoked after violation but before indictment); *United States* v. *Thompson,* 251 U. S. 407 (first grand jury refused to indict; charges submitted to second grand jury without

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[11] 41 Cong. Rec. 2753.

court approval); *United States* v. *Celestine*, 215 U. S. 278 (challenge to federal jurisdiction).[12]

Testing the appellee's motion to dismiss by this standard, we think it plain that it cannot qualify as a "motion in bar." The appellee did not deny that he refused to submit to induction, but he claimed that his conduct was not a crime because of the prior denial of counsel. He has not confessed to a crime and claimed immunity from prosecution; he argues that he has committed no crime.

We conclude, therefore, that we have no jurisdiction over this appeal under either the "construction of the statute" or "motion in bar" provisions of the Criminal Appeals Act. Accordingly, this case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in that court.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I believe that the appeal is properly here and I believe that *United States* v. *Mersky*, 361 U. S. 431, is a precedent that sustains my view and may not properly be distinguished as the Court undertakes to do.

In *Mersky* a statute governing the labeling of imported articles was involved. The Act made it mandatory to label articles of foreign origin with "the English name of the country of origin." It also said that the Secretary of the Treasury "may" determine the "words and phrases or abbreviations" which were acceptable "as indicating the country of origin." 19 U. S. C. § 1304 (a).

[12] Only two cases appear difficult to reconcile with the test adopted in text, and these are of dubious parentage. In *United States* v. *Covington*, 395 U. S. 57, and *United States* v. *Murdock*, 284 U. S. 141, defendants were being prosecuted for refusals to answer which they justified on grounds of Fifth Amendment privilege. *Murdock* itself, however, said that the plea was not appropriately presented as one in bar. 284 U. S., at 151. In *Covington*, we cited *Murdock* in assuming jurisdiction. 395 U. S., at 59 n. 2.

We held that the Act and the regulation were "so inextricably intertwined" that dismissal of the information "must be held to involve the construction of the statute." 361 U. S., at 438.

In the present case the Court concludes that the provision of the Military Selective Service Act of 1967 in issue and the regulations are "far short" of being "inextricably intertwined." But, with all respect, the only section of the Act quoted is the penal provision defining the crime of refusing to be inducted.[1] The more relevant section is § 10 (b)(3), 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. V), which reads in relevant part:

> "Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President [§ 10 (b)(1)], have the power within the respective jurisdictions of such local boards *to hear and determine,* subject to the right of appeal . . . , all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . . ." (Emphasis added.)

The question turns on the meaning of *"to hear and determine."* President Truman, pursuant to his rule-making power granted by § 10 (b)(1), promulgated on August 20, 1948, a regulation, now 32 CFR § 1624.1, which described the kind of "hearing" to which a registrant is entitled.[2] More precisely does the power "to

[1] As we noted only last Term in dealing with this same statute, "As a matter of sound construction, however, 'statute upon which the indictment . . . is founded' should be read to include the entire statute, and not simply the penalty provisions." *United States* v. *Sisson,* 399 U. S. 267, 280 n. 9.

[2] The predecessor of 32 CFR § 1624.1, as promulgated by President Truman, provided in relevant part:

"(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined

hear and determine" include the right of a registrant personally to appear? Does it include the right of a registrant to appear through an attorney or with an attorney? Is the question to be resolved "under the rules and regulations prescribed by the President" or is the Act to be read as including constitutional requirements of counsel? In my view the power "to hear and determine," granted by the Act, may indeed be more intertwined with the regulations than was the Act in the *Mersky* case. For in the latter, the Act, as noted, made it mandatory to label articles of foreign origin with "the English name of the country of origin." The power of the Secretary of the Treasury to promulgate regulations was therefore a power merely to fill in details. In contrast, the present Act leaves to "rules and regulations prescribed by the President" the scope and nature of the power of a local board *"to hear and determine"* the claims of a registrant. Is that constitutionally permissible?

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upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

"(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel." 13 Fed. Reg. 4858.

Section 1624.1 (a) was amended by President Johnson by Executive Order No. 11350 on May 3, 1967, in respects not material here. 32 Fed. Reg. 6961.

This case, rather than *Mersky*, is more nearly the one where the Act and the regulations are "so inextricably intertwined" that dismissal of the present indictment "must be held to involve the construction of the statute."

The District Court construed "hear and determine" claims of registrants "under rules and regulations prescribed by the President," as those words are used in § 10 (b)(3) of the Act, not to authorize "the constitutionally-suspect action of removing the right to be represented by counsel." 309 F. Supp., at 52. The District Court in granting the motion to dismiss accordingly concluded that it was "loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional." *Id.*, at 56. I therefore cannot say that the dismissal of the indictment was not based on a construction of the statute that the District Court never considered.

I would not remit the case to the Court of Appeals but would decide here and now whether in the circumstances here presented the registrant was entitled to the aid of counsel at the hearing before the board.

Syllabus

MONITOR PATRIOT CO. ET AL. *v.* ROY, EXECUTRIX

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 62. Argued December 17, 1970—Decided February 24, 1971

Just before the 1960 New Hampshire Democratic primary election, petitioner newspaper published a column characterizing senatorial candidate Roy as a "former small-time bootlegger." Roy, who was not elected, sued the newspaper and the distributor of the column for libel. The judge told the jury that Roy, as a candidate, was a "public official," and that a rule requiring a showing that the article was false and had been published "with knowledge of its falsity or with reckless disregard of whether it was false or true," applied as long as the libel concerned "official" as opposed to "private" conduct. The jury was instructed that if it found the libel to be in the "public sector," it had to bring in a verdict for the distributor, as there was no evidence that it had engaged in knowing or reckless falsehood, but that it had to decide on the "preponderance of the evidence" whether the newspaper was liable. If the publication was in the "private sector," there were two defenses: (1) "justification," if the article was true and published on a "lawful occasion," and (2) "conditional privilege," if the article was false but if the publication was "on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published." The jury returned a verdict against both the newspaper and the distributor of the column. The State Supreme Court affirmed, holding that the jury properly considered whether the alleged libel was "relevant" to Roy's fitness for office. *Held:*

1. Publications concerning candidates for public office must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. Pp. 270–272.

2. As a matter of constitutional law, a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for purposes of applying the "knowing falsehood or reckless disregard" rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Pp. 272–277.

3. The jury here was erroneously permitted to determine that the criminal charge was not "relevant" and that the *New York Times* standard was inapplicable. P. 277.

109 N. H. 441, 254 A. 2d 832, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 301. BLACK, J., filed an opinion concurring in the judgment and dissenting in part, in which DOUGLAS, J., joined, *post*, p. 277.

Edward Bennett Williams argued the cause for petitioners. With him on the briefs were *Harold Ungar* and *Joseph A. Millimet*.

Stanley M. Brown argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

On September 10, 1960, three days before the New Hampshire Democratic Party's primary election of candidates for the United States Senate, the Concord Monitor, a daily newspaper in Concord, New Hampshire, published a syndicated "D. C. Merry-Go-Round" column discussing the forthcoming election. The column spoke of political maneuvering in the primary campaign, referred to the criminal records of several of the candidates, and characterized Alphonse Roy, one of the candidates, as a "former small-time bootlegger."[1] Roy was not

[1] The text of the portion of the column concerning the New Hampshire primary was as follows:

"Political Snafu

"Rock-ribbed Republican New Hampshire, whose ex-Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate,

elected in the primary, and he subsequently sued the Monitor Patriot Co. and the North American Newspaper Alliance (NANA), the distributor of the column, for libel.

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is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

"Even that able Senate stalwart, Styles Bridges, is restirring himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within 11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

"Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have challenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

"One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

"Curious Call

"To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U. S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

"Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling 'on behalf of my friend Styles.'

" 'I don't want to get implicated in anything like that,' said LaVallee, 'Roy didn't mention Senator Bridges.'

"Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

"Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like

The newspaper and NANA offered "truth" as their primary defense at trial, and evidence was presented on the issue of whether or not Roy had in fact been a bootlegger during the prohibition era. The defendants also alleged that they had published in good faith, without malice, with a reasonable belief in the probable truth of the charge, and on a lawful occasion. At the close of the evidence, the trial judge instructed the jury at great length on the law to be applied to the case. Three possible defenses emerged from these jury instructions.

First, the trial judge told the jury that Roy was a "public official" by virtue of his candidacy in the primary. As a consequence, a special rule, requiring a showing that the article was false and had been published with "knowledge of its falsity or with a reckless disregard of whether it was false or true," would apply so long as the libel concerned "official conduct" as opposed to "private conduct." This private-public distinction was elaborated as follows: "Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with

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Alphonse Roy. The effect would be to cut down Herb Hill's chances.

"Convicts For Senator

"Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson Jr., who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawnmowers and a conviction for the nonsupport of his wife and three children.

"But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot."

official conduct of public officials?" The trial judge went on:

> "As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector."

The judge then instructed the jury that if it found the libel to be in the "public sector" it must bring in a verdict for NANA, since there had been no evidence that NANA had engaged in knowing or reckless falsehood, but that it still had to decide on the "preponderance of the evidence" whether the newspaper was liable.

Supposing the publication to be in the "private sector," the trial judge instructed the jury that there were two possible defenses available to the newspaper and NANA. The first was "justification," which would prevail if the jury found that the article was both true and published on a "lawful occasion." [2] The second defense was "con-

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[2] The trial judge gave the jury the following definition of a "lawful occasion":

"If the end to be attained by the publication is justifiable, that is, to give useful information to those who have a right and ought to know in order that they may act upon such information, the occasion is lawful. Where, however, there is merely the color of a lawful occasion and the defendant, instead of acting in good faith,

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ditional privilege," which could prevail even if the jury found the article to be false, but only if it also found that its publication was "on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published."

The jury returned a verdict of $20,000, of which $10,000 was against the newspaper and $10,000 against NANA. On appeal, the New Hampshire Supreme Court affirmed the judgment, holding that the trial judge properly sent to the jury the question of whether or not the particular libel alleged was "relevant" to Roy's fitness for office. 109 N. H. 441, 254 A. 2d 832. We granted certiorari in order to consider the constitutional issues presented by the case. 397 U. S. 904.

I

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280, we held that the First and Fourteenth Amendments require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The rule of *New York Times* was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation. The approach of *New York Times* was to identify a class of person—

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assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretense had not been resorted to."

The trial judge placed the burden of showing a "lawful occasion" on the defendants.

there public officials—and a type of activity—there official conduct—and to require as to defamations respecting them a particularly high standard of liability—knowing falsehood or reckless disregard of the truth. Later cases have made it clear that the applicability of this basic approach is not limited to those in public office or to the performance of official acts, or, for that matter, to conventional civil libel suits. *Garrison* v. *Louisiana,* 379 U. S. 64; *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130; *Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U. S. 6.

This case went to the jury in December 1966, after our decisions in *New York Times* and *Garrison,* but before *Curtis* and *Greenbelt.* The trial judge instructed the jury that Roy, as a candidate for elective public office, was a "public official," and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That *New York Times* itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law.[3] And if it be conceded that the First

[3] One of the citations was to a Kansas decision which admirably stated the case for the inclusion of candidates within the rule:

"[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counter-

Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U. S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

II

The jury in this case returned verdicts against both the newspaper and NANA. It is clear, therefore, that it found the bootlegger charge to be in the "private sector," since it had been instructed that unless it so found it could not impose liability on NANA. It is possible that having made this determination, it then concluded that the charge was true but "unjustified"—that is, that it had been published without a "lawful occasion." In any event, under the trial judge's instructions it was also free to return a money verdict if it found that the publication was false and had not been made "in good faith," for a "justifiable purpose," and with a "belief founded on reasonable grounds of the truth of the matter published." Since this standard is far less stringent than that of knowing falsehood or reckless disregard of the truth, the judgment must be reversed unless it can be shown that the *New York Times* rule is not applicable because of the nature of the libel in question. Cf. *Ocala Star-Banner Co.* v. *Damron*, *post*, p. 295.

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balance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged." *Coleman* v. *MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

The respondent argues that under *New York Times* a plaintiff has a special burden of proof only as to libels "relating to official conduct," that for a candidate "official conduct" means "conduct relevant to fitness for office," and that the public-private issue is one of fact for the jury. In our view, however, the syllogistic manipulation of distinctions between "private sectors" and "public sectors," or matters of fact and matters of law, is of little utility in resolving questions of First Amendment protection.

In *Garrison* v. *Louisiana, supra,* we reversed a conviction for criminal libel of a man who had charged that a group of state court judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Louisiana Supreme Court had held that these statements were not "criticisms . . . of the manner in which any one of the eight judges conducted his court when in session," but rather were accusations of crime and "personal attacks upon the integrity and honesty" of the judges. This Court rejected the proposed distinction:

> "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these

characteristics may also affect the official's private character." 379 U. S., at 76–77.

Cf. *Ocala Star-Banner Co.* v. *Damron, supra.*

The considerations that led us thus to reformulate the "official conduct" rule of *New York Times* in terms of "anything which might touch on an official's fitness for office" apply with special force to the case of the candidate. Indeed, whatever vitality the "official conduct" concept may retain with regard to occupants of public office, cf. *Garrison, supra,* at 72 n. 8, it is clearly of little applicability in the context of an election campaign. The principal activity of a candidate in our political system, his "office," so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary.[4] Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."

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[4] A commentator writing in 1949 described the ambience as follows: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like have usually filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent. If actionable defamation is possible in this field, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits." Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.

Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case. The trial judge presented the issue to the jury in the form of the question: "Is it more probable than otherwise that the publication that the plaintiff was a former small-time bootlegger was a public affair on a par with official conduct of public officials?" This instruction, and the others like it, left the jury far more leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments in the setting of a political campaign.

The application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press. The reasonable-man standard of liability, for example, serves admirably the essential function of imposing an objective and socially acceptable limit on the freedom of an individual to act with relation to others. But under our system of government, we have chosen to afford protection even to "opinions that we loathe and believe to be fraught with death," *Abrams* v. *United States,* 250 U. S. 616, 630 (Holmes, J., dissenting). A community that imposed legal liability on all statements in a political campaign deemed "unreasonable" by a jury would have abandoned the First Amendment as we know it. Likewise, a "preponderance of the evidence" burden of proof plays an indispensable role in the control of private negligence. But we have recognized that in the realm of political belief "the tenets of one man may seem the

rankest error to his neighbor," and that the advocates whom we protect may resort to "exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement," *Cantwell* v. *Connecticut,* 310 U. S. 296, 310. It is simply inconsistent with this commitment to permit the imposition of liability for political speech that "more probably than otherwise" in the opinion of the jury "would not touch upon or be relevant" to a candidate's fitness for office. Cf. *Speiser* v. *Randall,* 357 U. S. 513, 525–526; *Smith* v. *California,* 361 U. S. 147.

It is perhaps unavoidable that in the area of tension between the Constitution and the various state laws of defamation there will be some uncertainty as to what publications are and what are not protected. The mental element of "knowing or reckless disregard" required under the *New York Times* test, for example, is not always easy of ascertainment. "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law." *St. Amant* v. *Thompson,* 390 U. S. 727, 730–731. But there is a major, and in this case decisive, difference between liability based on a standard of care, and liability based on a judgment of the "relevance" of a past incident of criminal conduct to an official's or a candidate's fitness for office. A standard of care "can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Curtis Publishing Co.* v. *Butts, supra,* at 153 (opinion of HARLAN, J.). A standard of "relevance," on the other hand, especially such a standard applied by a jury under the preponderance-of-the-

evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra,* at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

We therefore hold as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the "knowing falsehood or reckless disregard" rule of *New York Times Co.* v. *Sullivan.* Since the jury in this case was permitted to make its own unguided determination that the charge of prior criminal activity was not "relevant," and that the *New York Times* standard was thus inapplicable, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For concurring opinion of MR. JUSTICE WHITE, see *post,* p. 301.]

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins.*

I concur in the judgments of the Court in this case and in No. 109 and No. 118, for the reasons set out in my concurring opinion in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (1964), in my concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170 (1967), and in MR. JUSTICE DOUGLAS' concurring opinion in *Garrison* v. *Louisiana,* 379 U. S. 64, 80 (1964).

*[This opinion applies also to No. 109, *Time, Inc.* v. *Pape, post,* p. 279, and No. 118, *Ocala Star Banner Co. et al.* v. *Damron, post,* p. 295.]

However, I dissent from those portions of the opinions in this case and No. 118 which would permit these libel cases to be tried again under a different set of jury instructions. As I have stated before, "[I]t is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Curtis Publishing Co.* v. *Butts, supra,* at 172 (separate opinion of BLACK, J.).

Syllabus

TIME, INC. *v.* PAPE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 109. Argued December 16, 1970—Decided February 24, 1971

In a discussion of "police brutality and related private violence" in its 1961 Report, the Civil Rights Commission mentioned the case of *Monroe* v. *Pape*, 365 U. S. 167, and listed some of the allegations of Monroe's civil rights complaint filed against certain Chicago policemen headed by Deputy Chief of Detectives Pape. In an article about the Report, Time magazine quoted from a summary of the complaint, without indicating that the charges were Monroe's and not the independent findings of the Commission. Pape sued the petitioner publisher for libel. The Court of Appeals reversed the District Court's grant of Time's motion for summary judgment, holding that there had to be a trial on the question of whether Time's failure to make clear that it was reporting no more than allegations showed "actual malice" (knowledge that the information was false or reckless disregard of whether it was false or not) under the rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. At the trial the author of the article and the researcher admitted awareness that the wording of the Report had been significantly altered but insisted that its real meaning had not been changed. The District Court granted Time's motion for a directed verdict at the close of the evidence, but the Court of Appeals reversed, holding that the jury should determine whether the omission of the word "alleged" showed "actual malice." Both courts agreed that Pape was a "public official" and that the article concerned his "official conduct." *Held:* In the circumstances of this case the magazine did not engage in a "falsification" sufficient in itself to sustain a jury finding of "actual malice." Pp. 284–292.

(a) The magazine's omission of the word "alleged" amounted to the adoption of one of several rational interpretations of a document bristling with ambiguities, and while that choice might reflect a misconception, it was not enough to create a jury issue of "malice" under the rule of *New York Times, supra*, as it would impose a stricter standard of liability on errors of interpretation or judgment than on errors of historic fact. P. 290.

(b) This holding is confined to the specific facts of this case, and nothing herein is to be understood as making the word "alleged" a superfluity in published reports of information damaging to reputation. P. 292.

419 F. 2d 980, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., filed an opinion concurring in the judgment, in which DOUGLAS, J., joined, *ante*, p. 277. HARLAN, J., filed a dissenting opinion, *post*, p. 293.

Don H. Reuben argued the cause for petitioner. With him on the briefs were *Harold R. Medina, Jr.*, and *Lawrence Gunnels.*

Patrick W. Dunne argued the cause for respondent. With him on the brief were *Robert J. Nolan* and *Edward J. Hladis.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In November 1961, the United States Commission on Civil Rights issued the fifth volume of its Report for that year, a document entitled Justice. A part of Justice was devoted to a study of "police brutality and related private violence," and contained the following paragraph:

> "*Search, seizure, and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:
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> ". . . [O]n October 29, 1958, at 5:45 a. m., thirteen Chicago police officers led by Deputy Chief of De-

tectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him." Justice 20–21.

A week later, Time, a weekly news magazine, carried a report of the Commission's new publication. The Time article began:

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated

> by field agents and it was signed by all six of the noted educators who comprise the commission."

There followed a description, with numerous direct quotations, of one of the incidents described in Justice, and then the following account of the Monroe incident:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a. m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* 'broke through two doors, woke the Monroe couple with flashlights . . . .'"

The Time article went on to quote at length from the summary of the Monroe complaint, without indicating in any way that the charges were those made by Monroe rather than independent findings of the Commission.

Pape sued Time for libel in the United States District Court for the Northern District of Illinois, there being diversity of citizenship. Time moved to dismiss the suit on the ground that the article was fair comment on a government report and therefore privileged under Illinois law; the District Court granted the motion, but the Court of Appeals for the Seventh Circuit reversed. 318 F. 2d 652. After remand, this Court decided *New York Times Co.* v. *Sullivan,* 376 U. S. 254, and on the basis of that decision the District Court granted Time's motion for summary judgment. On appeal, the Court of Appeals again reversed, holding that there must be a trial on the question of whether Time's failure to make clear that it was reporting no more than allegations showed "actual malice." 354 F. 2d 558.

At the trial, Pape called the policemen who had participated in the Monroe raid. They all testified that nothing resembling the events described in the Time

article as findings of the Commission had occurred.* There was also extensive testimony from the Time staff member who had written the article and from the "researcher" who had been responsible for checking its factual accuracy. The author testified that he had written the article on the basis of the Justice report itself, a Commission press release accompanying the report, and a New York Times news story describing Justice. He conceded that he knew the meanings of the words "alleged" and "complaint," but denied that the Time article was false, given the full context of the Justice report. The researcher testified that she had consulted several newspaper articles describing Monroe's claims about the raid, and several articles describing Pape's previous career. She said that she had also read two dispatches from Time's Chicago correspondent, one of them describing Monroe's charges without comment as to their truth and the other asserting as fact that the events had actually occurred. She conceded that she was aware of the omission of the word "alleged" in the Time article, but said that she believed the article to have been true as written.

At the close of the evidence, the District Court granted Time's motion for a directed verdict, 294 F. Supp. 1087, and Pape appealed for a third time. The Court of Appeals again reversed the District Court, holding that it was for the jury to determine whether Time's omission of the word "alleged" showed "actual malice." 419 F. 2d 980. We granted certiorari in order to decide the constitutional issue presented under the First and Fourteenth Amendments. 397 U. S. 1062.

*On January 24, 1963, after a jury finding of liability, judgment was entered against Pape in the civil rights suit brought against him by Monroe. The jury awarded Monroe damages of $8,000. Pape did not appeal, and the judgment was satisfied.

The District Court and the Court of Appeals were in agreement that the plaintiff Pape was a "public official" by virtue of his position as Deputy Chief of Detectives of the Chicago Police Department, and that the charges contained in the Monroe complaint, the Justice report, and the Time story concerned his "official conduct." The two courts differed only in their application of the rule of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, which "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 279–280.

The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Niemotko* v. *Maryland,* 340 U. S. 268, 271. Cf. *Napue* v. *Illinois,* 360 U. S. 264, 271–272. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review "the evidence in the . . . record to determine whether it could constitutionally support a judgment" for the plaintiff. *New York Times, supra,* at 284–285; *Beckley Newspapers* v. *Hanks,* 389 U. S. 81, 83; *St. Amant* v. *Thompson,* 390 U. S. 727; *Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U. S. 6, 11.

The Time news article reported as a charge by the Commission what was, in its literal terms, a description

by the Commission of the allegations in a complaint filed by a plaintiff in a civil rights action. This situation differs in a number of respects from the conventional libel case. First, the publication sued on was not Time's independent report of the Monroe episode, but its report of what the Civil Rights Commission had said about that episode. Second, the alleged damage to reputation was not that arising from mere publication, but rather that resulting from attribution of the Monroe accusations to an authoritative official source. Finally, Time made no claim of good-faith error or mere negligence. Both the author of the article and the researcher admitted an awareness at the time of publication that the wording of the Commission Report had been significantly altered, but insisted that its real meaning had not been changed.

The Court of Appeals concluded that it was obvious that the omission of the word "allegation" or some equivalent was a "falsification" of the Report. Since the omission was admittedly conscious and deliberate, the only remaining question in the court's view was whether there had been "malice" in the sense of an "intent to inflict harm through falsehood." Such an intent, the court thought, might reasonably be inferred from the very act of deliberate omission, and the issue of malice was consequently one for the jury.

Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves. For example, in *St. Amant, supra,* it made good sense to separate the question of the truth of St. Amant's charges of corruption and official misbehavior from the question of whether he had an adequate basis to believe them true. But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did.* Indeed,

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perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the "truth" of such an indirect newspaper report presents rather complicated problems.

A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.

The Civil Rights Commission's Justice report is a typical example of these problems. The underlying story that gave the report newsworthiness was the picture of police violence against citizens. Many of the incidents included were quite clearly designed to shock, anger, and alarm the reader, indeed to move him into a position of support for specific legislative recommendations of the Commission. Yet the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward.

First, the episodes were presented in the context of a report which from the first page purported to be dealing with a problem of unquestionable reality and seriousness:

> "In 1931 President Hoover's Wickersham Committee found extensive evidence of police lawlessness, including unjustified violence. Sixteen years later another Presidential Committee, this one appointed by President Truman, concluded that police brutality, especially against the unpopular, the weak, and the defenseless, was a distressing problem. And

> now in 1961 this Commission must report that police brutality is still a serious problem throughout the United States." Justice 1.

Two pages later, the report said that

> "The Commission is particularly impressed by the fact that most police officers never resort to brutal practices. Because of this fact, instances of brutality or discrimination in law enforcement stand out in bold relief. It is hoped that by focusing the attention of the President, the Congress, and the public on these remaining incongruities, this Report may contribute to their correction."

This process of focusing attention began on the next page with the chapter heading, in large type: "UNLAWFUL POLICE VIOLENCE." There followed the crucial description of the foundations on which the ensuing reports were based:

> "In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

This statement may fairly be characterized as extravagantly ambiguous. On the one hand, what was to follow was "11 typical cases of police brutality," each

of which "contribute[s] to an understanding of the problem," and was "substantial enough to justify discussion" in the study. A range of sources was described, each of a nature to inspire confidence in the reader. *But*, the reader was nonetheless told that these were "alleged facts," "allegations of misconduct," which had not been "determined conclusively" to be "correct." The suggestion that such a conclusive determination could be made only by a court capped the confusion: in context it was impossible to know whether the Commission was seeking to encourage belief or skepticism regarding the incidents about to be described.

Turning the page, the reader was confronted with another heading in capitals, "PATTERNS OF POLICE BRUTALITY," and then the descriptions of the various incidents began. Each had an italicized heading (*e. g.*, "*The killing of a Negro in Georgia: 1943*") followed by an account giving both sides of the story and carefully describing all facts as "alleged" or using direct quotations. The tone of total neutrality as to the truth or falsity of the claims of brutality was frequently marred, however, by remarks that appeared to indicate the Commission's unexpressed views. At the end of a description entitled "*The killing of a Negro in Georgia: 1958*," for example, the report said, "[n]o local disciplinary or criminal action was taken against any of the officers involved. The attitude of local authorities toward police was protective in this and several other cases of alleged brutality that occurred within a brief period . . . ." *Id.*, at 11.

The description of the Monroe incident bore the italicized title: "*Search, seizure, and violence: Chicago, 1958.*" Unlike the reports of the other incidents, however, this report limited itself to the summary of a plaintiff's complaint in a lawsuit, as indicated at the outset of this opinion. No attempt was made to give any other version

of the story, and the next report (*"The killing of a Negro in Cleveland: 1959"*) followed immediately after the end of the quotation.

In a chapter entitled "Conclusions," the Commission set forth its findings and recommendations. These included a finding that "police brutality by some State and local officers presents a serious and continuing problem in many parts of the United States. Both whites and Negroes are the victims, but Negroes are the victims of such brutality far more, proportionately, than any other group in American society." The recommendations included proposals for a grant-in-aid program to improve the quality of state and local police forces and for passage of a federal statute outlawing illegal police violence. *Id.*, at 109–112. Since the series of incidents described earlier in the report was the only evidence the Commission presented in support of its findings and recommendations, there was a logically inevitable implication that the Commission must have believed that the incidents described had in truth occurred.

In light of the totality of what was said in Justice, we cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, Time engaged in a "falsification" sufficient in itself to sustain a jury finding of "actual malice." The author of the Time article testified, in substance, that the context of the report of the Monroe incident indicated to him that the Commission believed that the incident had occurred as described. He therefore denied that he had falsified the report when he omitted the word "alleged." The Time researcher, who had read newspaper stories about the incident and two reports from a Time reporter in Chicago, as well as the accounts of Pape's earlier career, had even more reason to suppose that the Commission took the charges to be true.

Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

New York Times was premised on a recognition that, as Madison put it, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot's Debates on the Federal Constitution 571 (1876). With respect to errors of fact in reporting events, we said in *New York Times:*

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U. S., at 279.

These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of "truth" that would not put the publisher virtually at the mercy of the unguided discretion of a jury.

In certain areas of the law of defamation, *New York Times* added to the tort law of the individual States a constitutional zone of protection for errors of fact caused by negligence. The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability. This protection would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was "wrong," the error itself would be sufficient to justify a verdict for the plaintiff.

In *St. Amant* v. *Thompson, supra,* at 731, we said:

> "Our cases . . . have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U. S. 64 (1964) . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' 379 U. S., at 74. . . . These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact

> entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

Applying this standard to Time's interpretation of the Commission Report, it can hardly be said that Time acted in reckless disregard of the truth. Given the ambiguities of the Commission Report as a whole, and the testimony of the Time author and researcher, Time's conduct reflected at most an error of judgment. We have held that if "the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" misstatements of this kind must have the protection of the First and Fourteenth Amendments. *New York Times, supra,* at 271–272.

We would add, however, a final cautionary note. Nothing in this opinion is to be understood as making the word "alleged" a superfluity in published reports of information damaging to reputation. Our decision today is based on the specific facts of this case, involving as they do a news report of a particular government publication that purported to describe the specific grounds for perceiving in 1961 "a serious problem throughout the United States." "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson, supra,* at 732.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[For separate opinion of MR. JUSTICE BLACK, see *ante,* p. 277.]

MR. JUSTICE HARLAN, dissenting.

I would affirm the judgment of the Court of Appeals, essentially for the reasons stated in Judge Duffy's opinion for that court. The treatment of this case by our Court, however, prompts me to venture these additional comments.

I fully agree with the rule first enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), that restricts the liability of those who utter defamatory falsehoods regarding public officials. We there recognized that because "erroneous statement is inevitable in free debate," *id.*, at 271, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." *Id.*, at 273. But these considerations did not persuade us to rule that the Constitution grants absolute immunity to everyone, be it the news media or anyone else, who libels a public official, or to conclude that the usual processes of law are inadequate for dealing with this kind of litigation. Rather, we decided that the substantial First Amendment interests implicated in any libel suit of this sort would be adequately served by a constitutional rule that subjects such a statement to the sanctions of the common law of libel only where it was uttered "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280.

The step taken today, whereby this Court undertakes to judge, "on the specific facts of this case," *ante*, at 292, whether a jury could reasonably find that Time magazine's characterization of the Commission's report was sufficiently inaccurate to permit the concomitant finding that it was published with "malice," is, in my judgment, not warranted.

I can perceive no rational basis for distinguishing this case from one in which a newspaper or an individual seeks to have this Court review the record upon which a properly instructed jury found liability, where evidence

sufficient to support its verdict exists, and where these matters have been reviewed by a court of appeals applying correct legal standards. As I see things, the Court identifies no such distinguishing feature about this case.

While it is true, of course, that this Court is free to reexamine for itself the evidentiary bases upon which rest decisions that allegedly impair or punish the exercise of Fourteenth Amendment freedoms, this does not mean that we are of necessity always, or even usually, compelled to do so. Indeed, it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues. Nor can I discern in those First Amendment considerations that led us to restrict the States' powers to regulate defamation of public officials any additional interest that is not served by the actual-malice rule of *New York Times, supra,* but is substantially promoted by utilizing this Court as the ultimate arbiter of factual disputes in those libel cases where no unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions, cf. *New York Times, supra,* are present. While I am confident that the Court does not intend its decision to have any such broad reach, I fear that what is done today may open a door that will prove difficult to close.

Having determined that the court below properly defined the quality of proof required of Pape by *New York Times* and that it applied the correct standard of review in passing upon the trial judge's decision to grant a directed verdict—determinations that I do not think my Brethren dispute—I would stop the inquiry at this point and affirm the judgment of the Court of Appeals.

OCALA STAR-BANNER CO. ET AL. *v.* DAMRON

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 118. Argued December 17, 1970—Decided February 24, 1971

Petitioner newspaper published a false story that respondent, then a mayor and a candidate for county tax assessor, had been charged with perjury in federal court, and respondent sued for libel. The judge instructed the jury that the charge was libelous per se and that respondent could recover damages without showing malice. The jury awarded compensatory damages. The judge denied the newspaper's motion for a new trial on the basis of the "actual malice" test of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, on the ground that the article did not refer to respondent's official conduct. The Florida District Court of Appeal affirmed, holding that the *New York Times* rule did not apply. *Held:* A charge of criminal conduct against a public official or a candidate for public office, no matter how remote in time or place, is always "relevant to his fitness for office" for purposes of applying the *New York Times* rule of knowing falsehood or reckless disregard of the truth. *Monitor Patriot Co.* v. *Roy, ante,* p. 265. Pp. 299–301.

221 So. 2d 459, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. 301. BLACK, J., filed an opinion concurring in the judgment and dissenting in part, in which DOUGLAS, J., joined, *ante,* p. 277.

Harold B. Wahl argued the cause and filed briefs for petitioners.

Wallace Dunn argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Ocala Star-Banner Co., a petitioner in this case, publishes a small daily newspaper serving four counties in rural Florida. On April 18, 1966, the Star-Banner

printed a story to the effect that the respondent, Leonard Damron, then the mayor of Crystal River in Citrus County and a candidate for the office of county tax assessor, had been charged in a federal court with perjury, and that his case had been held over until the following term of that court.[1] This story was false. The respondent had not been charged with any crime in federal court, nor had any case involving him been held over, but the story was substantially accurate as to his brother, James Damron.[2] Two weeks later the

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[1] The story appeared under a three-column head ("Damron Case Passed Over To Next U. S. Court Term") and was as follows:

"INGLIS—A case charging local garage owner Leonard Damron with perjury was passed over for the present term of Federal Court after Damron entered a not guilty plea before Federal Judge Harrold Carswell in Gainesville.

"Damron was indicted by a Federal grand jury in Tallahassee last January and charged with perjury in a 1964 civil case which resulted in damages of $65,000 being awarded to a Yankeetown couple.

"Mrs. Gail Finley alleged that Levy County Deputy Sammy Cason slammed on brakes causing her to injure her neck in October of 1962.

"Cason and Deputy Walter Beckham went to Yankeetown with a warrant for the arrest of Mrs. Jean Rich Sill, who was allegedly in the Izaac Walton Lodge.

"According to officials, the Finleys interfered with the officers, were arrested and charged with interfering with arrest.

"A conviction obtained in County Court has been upheld through appeals by the Florida State Supreme Court.

"The civil suit which followed was filed under an old, little-used federal statute in which the Finleys charged former sheriff J. W. Turner and Cason with a violation of their civil rights.

"Damron testified that he had seen Mrs. Finley in a neck brace in late 1957 or early 1958 several years prior to the incident, but numerous other witnesses, summoned by the plaintiff, gave testimony, saying that Mrs. Finley had not previously worn a brace.

"Damron was released on $2,000 bond, following his arrest by federal marshals Jan. 27."

[2] The Star-Banner printed two retractions before the election.

respondent was defeated in the election for county tax assessor.

He filed the present suit against the Star-Banner in the Circuit Court of Marion County, Florida, alleging that the article was "libelous per se," and that it had caused him "irreparable damages to his reputation, as an individual, public officer, candidate for public office and as a businessman." He asked $50,000 as compensatory damages and $500,000 as punitive damages. At the trial, the newspaper did not deny that the story was wholly false as to the respondent, and explained the error as the result of a "mental aberration" by one of the paper's area editors. The area editor had been working for the paper for a little more than a month. He testified that he had run several stories about the political activities of the respondent, but had never heard of his brother James. When a local reporter telephoned in the story, correctly identifying the protagonist as James Damron, he inadvertently changed the name. The respondent presented evidence tending to cast doubt on this explanation.

At the close of the evidence, the respondent moved for a directed verdict on the issue of liability, and the trial judge granted the motion. The case then went to the jury on the issue of damages, with instructions which included the following:

> "The Court instructs the Jury that you need not consider whether a libel has been committed and instructs you that there must be a finding in favor of the Plaintiff in accordance with the other instructions given you by the Court. . . . You are instructed that in this case the charge made against the Plaintiff was libelous, per se, and that it created a presumption of damage to the Plaintiff but that

> if this presumption of damage is overcome by evidence offered by the parties and there is no proof of general damage to the Plaintiff by a preponderance of the evidence, then you cannot award anything more than nominal damages to the Plaintiff. The Court instructs the Jury that if you believe from the evidence and by the instructions of the Court that the Plaintiff is entitled to recover from the Defendants, then in addition to any compensatory damages, if any, that he may have—may recover, you may, as hereinafter stated, award the Plaintiff punitive damages when malice is shown or implied. . . . The Court instructs the Jury that malice may be implied or inferred where the charge of a felony is imputed to the Plaintiff. In other words, if you are reasonably satisfied from the evidence that the Defendants imputed the charge of perjury to the Plaintiff, of which he was not guilty, then you may infer that it was maliciously made and it is not necessary to prove any express malice or ill-will in order to warrant a verdict for punitive damages in favor of the Plaintiff."

The jury awarded Damron compensatory damages of $22,000 but failed to award any punitive damages.

The Star-Banner moved for a new trial, arguing that the case should have been sent to the jury under the "actual malice" test laid down by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254. The trial judge denied the motion on the ground that *New York Times* and later cases "relating to public officials or public figures in the official conduct of their office or position are not applicable to this cause of action which was founded upon a newspaper publication of the Defendants which was libelous per se and made no reference to the public offices held or sought by the Plaintiff." The

Florida District Court of Appeal affirmed the judgment, holding that:

> "An examination of the defamatory publication which gave rise to this case reveals that the plaintiff's official conduct or the manner in which he performed his duties were not the basis for the inaccuracy here involved; and, hence, it does not come within the protection afforded by the rule announced in the New York Times case. It follows therefore that the trial judge correctly held that it was unnecessary for the plaintiff to show malice." 221 So. 2d 459, 461.

The Supreme Court of Florida refused to review the judgment, 231 So. 2d 822, and we granted certiorari to consider the federal constitutional issues presented.[3] 397 U. S. 1073.

As the mayor of Crystal River, the respondent Leonard Damron was without question a "public official" within the meaning given the term in *New York Times Co.* v. *Sullivan, supra.* As such, he clearly fell within the rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. In his status as a candidate for the office of county tax assessor, he fell within the same rule. *Monitor Patriot Co.* v. *Roy, ante,* p. 265.

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[3] The respondent's argument that the newspaper "admitted liability" at trial, and that the constitutional issue of the applicability of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, is therefore not properly before us, must be rejected since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised. *WHYY* v. *Glassboro,* 393 U. S. 117, 119; *Raley* v. *Ohio,* 360 U. S. 423, 436; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134.

Yet it is clear that the *New York Times* test was not applied in the trial of this case. The trial judge himself resolved the issues of publication and falsehood against the newspaper. He then instructed the jury that since the article was "libelous, per se," its only task was to determine damages. Since the respondent was permitted to recover without a finding that the newspaper either knew the article was false or published it in reckless disregard of its truth or falsity, the judgment must be reversed unless there is some basis for saying that the rule of *New York Times* does not apply to the particular libel in question. *Henry* v. *Collins*, 380 U. S. 356; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 142–143, 158 (opinion of HARLAN, J.); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6.

The respondent urges upon us that a basis for distinguishing *New York Times* does exist, because the rule of that case applies only to "official conduct," [4] and a charge of indictment for perjury committed during testimony in a federal civil rights suit is a purely "private" libel. This contention is disposed of by our decision today in *Monitor Patriot Co.* v. *Roy*, *supra*. In that case we held that a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always "relevant to his fitness for office" for purposes of applying the *New York Times* rule of knowing falsehood or reckless disregard of the truth. Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times*

[4] *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 283 n. 23.

Both the trial judge on motion for new trial and the District Court of Appeal rested their conclusion that *New York Times* did not apply partly on the ground that the defamatory article nowhere mentioned the respondent's status as mayor of Crystal River or as a candidate for county tax assessor. The respondent has not pursued that theory here.

rule. And under any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office. Cf. *Garrison* v. *Louisiana*, 379 U. S. 64, 77.

The First and Fourteenth Amendments require reversal of the judgment. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For separate opinion of MR. JUSTICE BLACK, see *ante*, p. 277.]

MR. JUSTICE WHITE, concurring.*

Inevitably, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), by imposing on libel and slander plaintiffs the burden of showing knowing or reckless falsehood in specified situations will result in extending constitutional protection to lies and falsehoods which, though neither knowing nor reckless, do severe damage to personal reputation. The First Amendment is not so construed, however, to award merit badges for intrepid but mistaken or careless reporting. Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie. *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964). Its substance contributes nothing to intelligent decisionmaking by citizens or officials; it achieves nothing but gratuitous injury. The sole basis for protecting publishers who spread false information is that otherwise the truth would too often be suppressed. That innocent falsehoods are sometimes protected only to ensure access to the truth has been noted before, *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968), and it is well that the thought is repeated today in *Time, Inc.* v. *Pape*, *ante*, p. 279, at 292.

*This opinion applies also to No. 62, *Monitor Patriot Co.* v. *Roy*, *ante*, p. 265.

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RAMSEY ET AL., DBA LEON NUNLEY COAL CO., ET AL. *v.* UNITED MINE WORKERS OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88. Argued December 7, 1970—Decided February 24, 1971

Petitioner coal mine operators brought this Sherman Act conspiracy action against respondent union alleging that respondent had expressly or impliedly agreed with the major producers to impose the provisions of the 1950 National Bituminous Coal Wage Agreement (NBCWA) on all coal mine operators, knowing that the smaller ones would be unable to meet the NBCWA terms and would be driven out of business. Petitioners based their express-agreement claim on a later amendment, the Protective Wage Clause (PWC), whereby respondent undertook not to enter into any agreement with other operators on a basis other than the NBCWA, and their implied-agreement claim on the PWC and subsequent activities of respondent and the major operators. Following a trial, the trial judge dismissed the case for failure of proof, finding that the PWC did not constitute an express commitment by respondent not to bargain with other operators except on NBCWA terms but that, all evidence considered, an implied commitment to do so would be inferred if the applicable standard of proof were the preponderance-of-the-evidence standard ordinarily applied in civil cases. He concluded, however, that where a labor union is involved, § 6 of the Norris-LaGuardia Act requires a standard of "clear proof," both with respect to the authority of individuals alleged to have performed illegal acts on behalf of unions and with respect to whether the acts themselves occurred, amounted to a conspiracy, and had injured the plaintiff's business. Section 6 provides that no organization participating in a labor dispute shall be liable for the unlawful acts of individual officers or members except upon "clear proof" of actual participation in or authorization of such acts. The District Court's judgment was affirmed by an equally divided Court of Appeals. Petitioners additionally urge a construction of the PWC which would make it an illegal agreement for which respondent is not exempt under the antitrust laws, and they ask for reconsideration of the holding in *Mine Workers* v.

Pennington, 381 U. S. 657, that a union is not liable under the antitrust laws when it concludes "a wage agreement with a multi-employer bargaining unit . . . and as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek[s] the same wages from other employers." *Held:*

1. The ordinary preponderance-of-the-evidence standard is applicable in civil antitrust actions against labor unions except with respect to proving the authority of individual members, officers, or agents of a union to perform on behalf of the union the acts complained of, where the "clear proof" standard applies. Pp. 307–311.

2. This Court cannot properly consider in the first instance petitioners' additional argument about the construction of the PWC since it is not clear if the contention was made below and whether, in any event, the record supports it. Pp. 311–312.

3. The Court's decision in *Pennington* is reaffirmed both with respect to the holding (1) that a union may make wage agreements with a multi-employer bargaining unit and in pursuit of its own self-interests seek to secure the same terms from other employers and (2) that the antitrust exemption is forfeited if the union agrees with an employer group to impose a certain wage scale on other bargaining units, thus joining a conspiracy to limit competition. Pp. 312–314.

416 F. 2d 655, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BLACK, HARLAN, and MARSHALL, JJ., joined, *post*, p. 314.

John A. Rowntree argued the cause for petitioners. With him on the briefs were *Clarence E. Walker, William M. Ables, Jr., Sizer Chambliss,* and *A. Allan Kelly.*

Edward Bennett Williams argued the cause for respondent. With him on the brief were *Steven M. Umin, Edward L. Carey, Harrison Combs, Willard P. Owens, E. H. Rayson,* and *M. E. Boiarsky.*

Guy Farmer filed a brief for the Bituminous Coal Operators' Association as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, coal mine operators in southeastern Tennessee, were plaintiffs in the trial court, where their complaint accused respondent United Mine Workers of America of violating the Sherman Act by conspiring with various coal producers to drive petitioners out of business. The major thrust of the claim was that the Union had expressly or impliedly agreed with the major producers to impose the provisions of the National Bituminous Coal Wage Agreement (NBCWA), first executed by the Union and certain companies in 1950, on all coal mine operators, knowing that small and nonmechanized operators would be unable to meet the contract's terms. The purpose of this alleged conspiracy was to eliminate the marginal operators, control production, and reserve the market for larger concerns. The claim of express agreement rested on the so-called Protective Wage Clause (PWC) added to the NBCWA by amendment in 1958. The PWC, after reciting that the parties agreed that coal mines "shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract," provided as follows:

> "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and

> exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." [1]

Petitioners in any event claimed that a conspiratorial arrangement between the Union and the major operators could be implied from the PWC, the course of negotiations between the Union and those operators from 1950 forward,[2] and the ensuing organizational and strike activity against petitioners and other southeastern Tennessee operators aimed at securing agreement to and compliance with the National Agreement as amended from time to time, as well as from the Union's purchase of a controlling interest in West Kentucky Coal Co. and the latter's allegedly predatory pricing in the TVA coal market.

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[1] In return the operators agreed "that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement" should be produced under terms and conditions which are as favorable to the employees as those provided for in this contract.

In another case, *Tennessee Consolidated Coal Co.* v. *UMW*, 416 F. 2d 1192 (CA6 1969), the Court of Appeals stated that the Protective Wage Clause was a "quid pro quo" for the foregoing undertaking of the operators which was described by the court as an agreement "to boycott coal not produced in conformity with the national agreement." 416 F. 2d, at 1198.

[2] The Bituminous Coal Operators Association (BCOA) was formed as a multi-employer collective-bargaining unit in 1950, just after signing of the 1950 NBCWA. Member employers ranged from the small to the large, though its members mined about 50% of U. S. bituminous coal. It formed a "negotiating committee" analogous to the UMW's "policy committee," to represent member employers at the bargaining table. *Ramsey* v. *UMW*, 265 F. Supp. 388, 407 (ED Tenn. 1967). Relations between union and management improved greatly during the 1950's, leading petitioners to suggest that the absence of strife indicated the rise of the conspiracy. *Id.*, at 407–408.

Following a trial to the court on a voluminous record, the trial judge wrote an extensive opinion containing his findings and conclusions leading to a dismissal of the case for failure of proof. *Ramsey* v. *UMW*, 265 F. Supp. 388 (ED Tenn. 1967). He interpreted the PWC as forbidding departure from the contract terms by the Union only where signatories were concerned; the court found nothing in the contract obligating the Union to insist on comparable terms when dealing with employers outside the bargaining unit. As for an implied conspiracy to standardize employment terms throughout the industry aimed at destroying marginal producers, the trial court said that "[w]ere this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U. M. W. did so impliedly agree," but that "the standard of proof where a labor union is involved is 'clear proof,' as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion." [3] 265 F. Supp., at 412. Judged by this stricter standard, proof of conspiracy was found wanting and the case against the Union failed.

A panel of the Court of Appeals ruled the trial court had erred in applying the clear-evidence standard but rehearing *en banc* was granted. The Court of Appeals then agreed with the District Court's construction of the PWC but with respect to the clear-evidence standard, four judges agreed with the trial judge and four disagreed. The latter insisted that the ordinary preponderance-of-evidence standard was applicable in civil antitrust actions against labor unions except with respect to proving the authority of individual members, officers, and agents of

[3] The court later said, "Did not the clear evidence rule apply, the Court might have reached a different conclusion upon certain issues." 265 F. Supp., at 434.

the Union to perform the acts complained of on behalf of the Union. The District Court's judgment was therefore affirmed by an equally divided court. *Ramsey* v. *UMW*, 416 F. 2d 655 (CA6 1969). We granted certiorari. 397 U. S. 1006 (1970).

I

In a section of his opinion entitled "Legal Guidelines," the District Judge inquired as to "the standard of proof that must govern a proceeding involving a Sherman Act charge against a labor union." His answer was: "The burden of proof borne by the plaintiff is not the usual preponderance of the evidence rule applicable in civil cases generally. The requirement imposed by Section 6 of the Norris-LaGuardia Act is that of 'clear proof' where a labor organization is a party to an action such as this. . . . That the 'clear proof' standard applies to an action wherein a labor organization is sought to be charged with a Sherman Act violation appears settled." 265 F. Supp., at 400. In this and other passages in the trial judge's opinion,[4] he apparently demanded clear proof rather than a preponderance of the evidence not only with respect to the authority of the individuals who were alleged to have performed certain illegal acts on behalf of unions, but also as to whether the acts themselves occurred, whether the acts proved amounted to a conspiracy and whether plaintiffs' businesses had been injured. The eight judges of the Court of Appeals also seemed to read the trial court as having given unlimited application to the clear-proof standard in this action. Apparently they were also convinced that the standard applied by the trial court had made a critical difference in the case, for the issue that equally divided them was whether the clear-proof standard should be

[4] See n. 3, *supra*, and accompanying text.

applied to any matters other than the Union's authorization of the conduct alleged and proved.[5]

The reasoning of the lower courts in departing from the usual preponderance-of-evidence rule generally applicable to civil actions in federal courts[6] was rooted in § 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. § 106. But the trial judge and four judges of the Court of Appeals read far too much into § 6, which provides as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be

[5] The Union urges not only that the trial court properly understood the limited scope of § 6 but also that on most if not all significant issues the proof failed even under the preponderance-of-evidence rule. For the first proposition the Union relies on the trial judge's instructions to the jury in a later case, which are reported in *Tennessee Consolidated Coal Co.* v. *UMW*, 416 F. 2d, at 1200–1203, and which are said to construe § 6 more narrowly. But we must decide the case before us, not some other one in which the trial court may have evidenced different views. Here the Union's claim is belied by the language of the trial court's opinion and its interpretation by the eight judges of the Court of Appeals. The second proposition—that the trial court's clear-evidence ruling was mere dictum—leaves unexplained the Court of Appeals' affirmance by an equally divided court as well as the trial judge's remarks that he would or might have reached different results on some issues, apparently including some aspects of the conspiracy issue, if preponderance of the evidence was the governing standard. To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand. We do note from the trial court's opinion that except for violence and some picketing, issues of union responsibility for acts alleged and proved were nonexistent or played little part in the thinking of the trial judge.

[6] "In civil cases [the fact finder's] duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates . . . ." *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 266 (1878).

> held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Judge O'Sullivan cogently observed in the Court of Appeals that: "This is plain language which . . . clearly exposes the Section's limitation." 416 F. 2d, at 667. On its face § 6 is not addressed to the quantum of evidence required to prove the occurrence of the alleged "unlawful acts." It is concerned only with requiring "clear proof" that the person or organization charged actually participated in, authorized, or ratified "such acts." Nothing in the words of the section suggests that a new and different standard of proof was being prescribed for all issues in actions against a union, its members or its officers involved in a labor dispute. The section neither expressly nor by implication requires satisfaction of the clear-proof standard in deciding factual issues concerning the commission *vel non* of acts by union officers or by members alleged to constitute a conspiracy, or the inferences to be drawn from such acts, or concerning overt acts in furtherance of the conspiracy, the impact on the relevant market or the injury to plaintiffs' businesses.

The legislative history of § 6 was reviewed at length in *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395 (1947). We have reviewed it again and we find nothing to suggest that the section means something different from what its language seems to say.[7] Without laboring the matter—since nothing to the contrary in the legislative history has been presented to us—

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[7] As we noted in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 736 n. 26 (1966), the fullest statement concerning the basis and impact of § 6 is found in S. Rep. No. 163, 72d Cong., 1st Sess., 19–21.

the simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. Congress discerned a tendency in courts to blame unions for everything occurring during a strike. Nor was the problem necessarily limited to labor unions.[8] The straightforward answer was § 6, with its requirement that when illegal acts of any individual are charged against one of the major antagonists in a labor dispute—whether employer or union—the evidence must clearly prove that the individual's acts were authorized or ratified. See *id.*, at 403. We find no support in the legislative material for the notion that Congress intended broadly to modify the standard of proof where union and employer are sued separately or together in civil actions for damages incurred in the course of labor disputes.

Prior cases in this Court relied on by the courts below are not to the contrary. *Carpenters'* major concern was § 6. The Court there said that "[t]he limitations of that section are upon all courts of the United States in all matters growing out of labor disputes, covered by the Act, which may come before them." *Id.*, at 401. The statement is unexceptionable—the federal courts, of course, must heed § 6 in all cases arising out of labor disputes in which the section is applicable.[9] However, the limitations the section imposes are those that the section describes. It is clear from the remainder of

[8] "Moreover, it will be observed that this section . . . applies both to organizations of labor and organizations of capital." *Id.*, at 19.

[9] The "more stringent standards" of § 6 were modified by Congress for purposes of the Labor Management Relations Act. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 736 (1966). See National Labor Relations Act, as amended, § 2 (13), 61 Stat. 139, 29 U. S. C. § 152 (13); Labor Management Relations Act, 1947, §§ 301 (e), 303 (b), 61 Stat. 157, 159, 29 U. S. C. §§ 185 (e), 187 (b).

the *Carpenters* opinion that § 6 deals only with proving the authority of individuals or organizations who act for another. Indeed, the Court there reversed a judgment against a union because the trial court had failed to instruct that illegal acts could not be proved against the union unless the evidence clearly showed the union had authorized, participated in, or ratified the commission of those acts.

United Mine Workers v. *Gibbs,* 383 U. S. 715 (1966), insofar as it dealt with § 6, was concerned only with the failure of the evidence clearly to show union responsibility for illegal acts of violence. There was no suggestion in that case that § 6 had broader scope. And § 6 was not even involved in *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), as it came to this Court. The section was neither cited nor discussed and there were no indications that our passing reference, 381 U. S., at 665, to forfeiture of union exemption from antitrust liability when union connivance with employers is clearly shown was intended to establish a stricter standard of proof in actions charging labor unions with violations of the Sherman Act.

In our view, § 6 requires clear and convincing evidence only as to the Union's authorization, participation in, or ratification of the acts allegedly performed on its behalf. Nor do we discern any basis for our fashioning a new standard of proof applicable in antitrust actions against labor unions. Accordingly, the District Court erred in requiring petitioners' compliance with the standard of § 6 in proving other elements of their treble-damage case against the Union.

II

Petitioners argue two other matters. We are urged to construe the PWC as itself being an illegal bargain for which the Union is not exempt under the antitrust

laws. The thrust of the argument in this Court is that by 1958, when the PWC was first agreed to by the Union and the BCOA, the Union had executed the national contract with hundreds of different bargaining units in addition to those represented by the BCOA. Even if the PWC bound the Union only to insist on identical contract terms as against "signatories," the effect of the clause, it is urged, was to bind the Union to the same contract, *ad infinitum*, with many and different bargaining units; the Union was no longer free to agree to different terms with any previous signatory to the NBCWA.[10] We find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance.

Finally, petitioners in effect ask us to reconsider our holding in *Pennington* and other cases that under the Clayton and Norris-LaGuardia Acts the Union incurs no liability under the antitrust laws when it concludes "a

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[10] From the opinion of the District Court it appears that George Ramsey, one of the petitioners, "was a signatory to the National Bituminous Coal Wage Agreement from the time he began operations [in 1954] until 1960. In 1958 he was sued by the Welfare Fund for non-payment of royalties and the following two years his payments to the Welfare Fund exceeded his profits. In fact, he lost money in 1960. In that year his employees withdrew from the U. M. W. and joined the Southern Labor Union and he terminated his U. M. W. contract." 265 F. Supp., at 428. Other companies refused to sign the National Contract and negotiated for modifications. "[O]n December 26, 1962, the miners in most of the Southeastern Tennessee coal field ceased working. . . . While it does not appear that the U. M. W. called the strike, it is clear that it sanctioned and approved the strike." *Ibid.*

wage agreement with the multi-employer bargaining unit . . . and . . . as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek[s] the same wages from other employers." 381 U. S., at 664. This we decline to do. The Court made it unmistakably clear in *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 811 (1945), that unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may also restrain trade. "[T]hese congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly." But "the desirability of such an exemption of labor unions is a question for the determination of Congress." 325 U. S., at 810. We adhere to this view. But neither do we retreat from the "one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. . . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.,* at 811. Hence we also adhere to the decision in *Pennington:* "[T]he relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." 381 U. S., at 669. Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL concur, dissenting.

This phase of this protracted litigation involves quite a different problem than the one presented in *United Mine Workers* v. *Pennington*, 381 U. S. 657. *Pennington* involved the question whether § 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia Act, 47 Stat. 70, under the complaint there made exempted the United Mine Workers from liability under the antitrust laws. That was recognized as the single issue. *Id.*, at 661–666. The Court said, "[W]e think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.*, at 665.

The question in this case involves not the scope of the exemption but whether the Sherman Act has been violated. As we said in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 512, "[A]ctivities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act."

A union-employer agreement to force other employers out of business causes the union to lose its exemption. But the fact that a union may be sued under the Sherman Act does not mean that it is necessarily liable. The question in the present case is, indeed, only one phase of the alleged Sherman Act violation. It solely concerns the kind of proof needed.

This phase of the litigation turns on the meaning of § 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. § 106, which provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The Court says that: "On its face § 6 is not addressed to the quantum of evidence required to prove the occurrence of the alleged 'unlawful acts.'" I respectfully disagree.

Unions usually act through officers, members, or agents, not as a body. Their liability is therefore vicarious; and Congress was anxious to safeguard, curtail, and limit it. The "clear proof" required was not restricted to "clear proof" of authority to act or "clear proof" of agency or "clear proof" of other "authorization." The "clear proof" was "clear proof" of authority to commit "the unlawful acts." The "clear proof" required was "clear proof" of "actual participation" in the "unlawful acts." The "clear proof" required was "clear proof" of the "ratification" of the "unlawful acts."

Authorization to perform those "unlawful acts" like ratification of them or participation in them must, if § 6 is to be given full vitality, be based on "clear proof" that the union had full complicity in the scheme.[1] It is in

[1] That was our construction of § 6 in *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 410–411. That construction provoked Mr. Justice Frankfurter to say in dissent: "Practically

my view a drastic rewriting of § 6 to conclude as does the Court that: "The straightforward answer was § 6, with its requirement that when illegal acts of any individual are charged against one of the major antagonists in a labor dispute—whether employer or union—the evidence must clearly prove that the individual's acts were authorized or ratified."

United Mine Workers and BCOA (Bituminous Coal Operators Association) entered into an industry-wide wage agreement in 1958 which provided wage scales for employees of all "signatory operators" of coal lands or leases.

It is argued that this agreement constituted an agreement by United Mine Workers to impose the wage scale on all nonsignatory coal operators in order to force some (including petitioners) out of business. If that was the agreement then, as I said in *Pennington* (381 U. S., at 674), the union would have lost its exemption. But there is not a word in the agreement, as I read it, that covers nonsignatory operators.

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speaking, the interpretation given by the Court to § 6 serves to immunize unions, especially the more alert and powerful, as well as corporations involved in labor disputes, from Sherman Law liability. To insist that such is not the result intended by the Court is to deny the practical consequences of the Court's ruling." *Id.*, at 422.

Yet, as S. Rep. No. 163, 72d Cong., 1st Sess., 19, said respecting § 6: "Opposition to this section has been voiced on the ground that it seeks to establish a 'new law of agency.' In the first place, this section is concerned especially with establishing a rule of evidence. There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an 'unlawful act' except upon 'clear proof' of participation or authorization or ratification." And see H. R. Conf. Rep. No. 793, 72d Cong., 1st Sess., 6; H. R. Conf. Rep. No. 821, 72d Cong., 1st Sess., 6.

It is, however, contended that even though there is no express commitment to drive marginal operators out of business, there was a conspiracy between BCOA and United Mine Workers to impose a wage scale upon the total industry which had the purpose and effect of driving the small, marginal operators out of business.

On this issue of the case, Judge Wilson of the District Court ruled:

> "Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U. M. W. did so impliedly agree. However, the standard of proof where a labor union is involved is 'clear proof,' as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion. United Brotherhood of Carpenters v. United States, 330 U. S. 395 . . . ; United Mine Workers v. Gibbs, 383 U. S. 715 . . . . The Court is of the opinion that the evidence upon the record in this case does not establish such clear and unequivocal proof as to warrant the Court in finding that the U. M. W. pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy upon its own. The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer." 265 F. Supp. 388, 412.

The action of United Mine Workers officials in agreeing to the wage clause was the action of fully authorized agents. If that is all that the "clear proof" of § 6 requires, the case would be easy. For then it would be immaterial whether "clear proof" of an illegal purpose

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or "preponderance of the evidence" were the test, for whichever were required, there would be no difference. If therefore "clear proof" is to set labor-antitrust cases apart from the rest—as it clearly was designed to do—it must embrace a union program to impose a wage scale on the entire industry with the purpose and effect of driving the small, marginal operators out of business.

Judge Wilson of the District Court and eight members of the Court of Appeals have reviewed the evidence in detail. While they agree that a case against the union has been made out if "preponderance of the evidence" is the test, none has suggested that the "clear proof" test has been satisfied if it is to mean more than "clear proof" of an agency relation.

In *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 739, we spoke of the effect of § 6 in a case where the union is charged with the damages flowing from violence:

> "What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force."

If in *Gibbs* union officials were authorized to talk with employers and to protest certain issues that threatened the union's interests, would the union be liable if the protest became so heated that it erupted into violence? Certainly not. Authorization to use dynamite in the protest would be "clear proof"; authorization to carry dynamite for a lawful purpose would certainly not be "clear proof" of the authorization to use the dynamite to destroy an employer's business.

In the present case, authorization of union officials to use their best efforts to get an industry-wide wage scale

does not necessarily include authorization to drive some employers out of business. As Mr. Justice Goldberg pointed out in *Meat Cutters* v. *Jewel Tea*, 381 U. S. 676, 697 *et seq.*, there is obviously nothing illegal *per se* about industry-wide collective bargaining.[2] A particular agreement becomes vulnerable under the antitrust laws only if there is "clear proof" that the purpose of the union [3]

[2] Mr. Justice Goldberg said: "This history also shows that labor contracts establishing more or less standardized wages, hours, and other terms and conditions of employment in a given industry or market area are often secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a 'pattern' for agreements on labor standards with other employers. These are two similar systems used to achieve the identical result of fostering labor peace through the negotiation of uniform labor standards in an industry." 381 U. S., at 722.

[3] In the prior Congress a measure like § 6 was introduced. It is described in S. Rep. No. 1060, pt. 2, 71st Cong., 2d Sess., 18–19: "[W]hy should an officer of a labor union, who has specifically advised members that violence must be avoided, become responsible for the hot-headed action of some member in perhaps assaulting a strike breaker? Again, the relationship between officers and members of labor unions and other members is not that of employer and employee. The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of determining whether or not they will employ them. It may be accepted that if a group associated in common activities becomes controlled by a lawless majority, it may be necessary for law-abiding men to dissolve their association with lawbreakers; but the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability."

was not to advance the coal miners' interests but to do in one or more operators.

By the same reasoning we should ask here: Was there "clear proof" that the union approved a plan to drive small, marginal operators out of business?

Since on this record no one has suggested that there is such "clear proof," the judgment of the District Court should be affirmed.

Syllabus

ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80. Argued November 10, 1970—Decided February 24, 1971

Respondent (HRI) brought a patent infringement suit against petitioner (Zenith) in 1959, and in 1963 Zenith counterclaimed for damages alleging violations of the Sherman and Clayton Acts by HRI's participation in patent pools in Canada, Great Britain, and Australia, restricting Zenith's operations in those countries. A year after evidence was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. HRI then moved to amend its reply to the counterclaim and to reopen the record for taking additional evidence. HRI sought to assert defenses of the statute of limitations, and release, claiming that part of the damages awarded Zenith for 1959–1963 were caused by pre-1959 conduct and thus barred by the statute of limitations, or were barred by a 1957 release given by Zenith to certain American companies in settlement of a civil treble-damage action. The trial judge permitted the defenses to be filed but refused to reopen the record or modify his findings and conclusions concerning the Canadian market. The Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business. This Court reversed with respect to Canada, holding that there was ample evidence of damage in the Canadian market and noting that the trial judge had either rejected the limitations and release defenses on the merits or deemed them waived, 395 U. S. 100. On remand the Court of Appeals held that the trial judge erroneously rejected the defenses on their merits. That court, while doubting that Zenith's claim that the statute of limitations was tolled (by reason of a Government antitrust suit pending from 1958 to 1963 against various companies participating along with HRI in the Canadian patent pool), was properly before it, since no formal plea had been entered, rejected the tolling argument, concluding that tolling takes place only with respect to parties to a Government suit and HRI was not such a party. The court further ordered evidence to determine the extent of reduction of damages by virtue of the defenses it sustained. *Held:*

1. Under the circumstances of this case, the trial judge did not abuse his discretion if his rejection of the limitations and release

defenses was based on HRI's waiver due to untimeliness of their presentation. Pp. 328–333.

2. The Court of Appeals erroneously rejected Zenith's claim that the statute of limitations was tolled during the pendency of the Government's antitrust suit against the other participants in the patent pool. Pp. 333–338.

(a) Where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised. P. 334.

(b) Under 28 U. S. C. § 16 (b) the statute of limitations is tolled against all participants in a conspiracy that is the object of a Government suit, whether or not they are named as defendants or conspirators therein. Pp. 335–338.

3. A plaintiff in an antitrust action may recover damages occurring within the statutory limitation period that are the result of conduct occurring prior to that period if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof. Pp. 338–342.

4. The effect of a release upon coconspirators is to be determined in accordance with the intention of the parties, and here HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not entitled to the benefit of the release, as the agreement to exchange releases provided expressly that they were "to bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release." Pp. 342–348.

418 F. 2d 21, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the result, in which STEWART, J., joined, *post*, p. 349.

Thomas C. McConnell argued the cause for petitioner. With him on the briefs were *Philip J. Curtis* and *Francis J. McConnell.*

Victor P. Kayser argued the cause for respondent. With him on the briefs were *John T. Chadwell, C. Lee Cook, Jr., Joseph V. Giffin, Robert F. Ward,* and *Laurence B. Dodds.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This is the second time this marathon litigation has been before us. It began in 1959 as a suit for patent infringement brought by Hazeltine Research, Inc. (hereafter HRI), against Zenith. In 1963, Zenith filed a counterclaim against HRI alleging violations of the Sherman and Clayton Acts, as amended, 26 Stat. 209, 38 Stat. 731, 737, 15 U. S. C. §§ 1, 2, 15, 26, by reason of HRI's participation in patent pools in Canada, Great Britain, and Australia. These pools, it was claimed, operated to exclude Zenith from those foreign markets by refusing to grant patent licenses to American manufacturers seeking to export American-made radio and television sets. Trial was had without a jury. Zenith submitted telling evidence as to the existence and operation of the conspiracy and HRI's participation in each of the markets. Zenith demonstrated the fact and extent of its business injury by estimating the percentage of the foreign market it would have enjoyed absent the conspiracy during the four years prior to 1963 and showing the portion it actually enjoyed during those years. The difference between the profits it actually made and the profits it would have made in a free market during the four years was the measure of the damages demanded.

A year after evidence was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. He concluded that Zenith had been damaged $6,297,371 in the Canadian market, $9,248,926 in the English, and $692,555 in the Australian, a total of $16,238,872 before trebling. HRI then moved to amend its reply to Zenith's counterclaim and to reopen the record for the taking of additional evidence. The motion sought leave to assert the defenses of limitations and release; the claim was that part or all of the dam-

ages awarded to Zenith for the four years 1959–1963 were caused by pre-1959 conduct and to that extent were barred by the statute of limitations, 15 U. S. C. § 15b, or by a release given by Zenith to certain American companies in 1957. HRI also sought leave to prove that until specified dates Zenith's exclusion from the English and Australian markets had been due, not to the operation of the alleged patent pools, but to such matters as official embargoes, tariffs, and technical factors. The trial judge agreed to take additional evidence with respect to England and Australia but refused to reopen the record for other purposes or to modify his findings and conclusions concerning the Canadian market. He did, however, permit the limitations and release defenses to be filed and, after hearing evidence with respect to the English and Australian markets, reduced his award of damages with respect to them. 239 F. Supp. 51 (1965).

In the Court of Appeals, HRI asserted error on various grounds. Putting aside other issues, the Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business in any of the three markets. 388 F. 2d 25 (1967). We, in turn, affirmed the judgment denying recovery for the alleged injury in the English and Australian markets, but reversed with respect to Canada, holding that Zenith's evidence amply demonstrated the fact of damage in the Canadian market. 395 U. S. 100 (1969). We also noted that some portion of the damages proved and awarded resulted from conspiratorial conduct prior to 1959 and that the trial judge had either rejected on the merits the defenses of limitations and release or deemed them waived. *Id.*, at 117 n. 13. We went no further, however, with respect to the issues surrounding either defense.

The Court of Appeals on remand accepted as duly proved that absent the conspiracy Zenith would have

enjoyed a 16% share of the Canadian market and that the difference between 16% and the share it actually had was the measure of the total damages inflicted by the conspiracy during the four years 1959–1963. But recognizing that some portion of Zenith's business injury resulted from conspiratorial conduct prior to 1959, the court went on to hold that the trial judge had not rejected the defenses of limitations and release on waiver grounds but had erroneously rejected them on their merits, and further that Zenith's claim that the statute had been tolled had been waived by Zenith and was in any event unsound. Finally, the court ordered further evidence to be taken in the trial court to determine the extent to which, if any, the damages awarded by the trial court should be reduced by virtue of the defenses sustained in the Court of Appeals. 418 F. 2d 21 (1969).

We granted certiorari. 397 U. S. 979 (1970). Zenith's principal contentions here are that the trial judge properly deemed the limitations and release defenses to have been waived, that if not waived, the defenses were without merit, and that in any event the statute of limitations was tolled by the pendency of a Government suit against HRI's coconspirators. We need not decide whether the trial judge held the defenses waived or rejected them on the merits, since in our view, either course would have been legally sound. We therefore reverse the Court of Appeals.

I

We deal first with Zenith's claim that the defenses of limitations and release were properly held by the trial court to have been waived. To do so it is essential briefly to outline the course of the trial and evidence. Zenith's 1963 counterclaim alleged the existence of the conspiracy and the impact on its business and prayed for damages and injunctive relief, but made no allegations as to the time period as to which damages were sought.

These latter matters became clear during the pretrial proceedings and during the course of the trial itself. In its pretrial brief and opening statement Zenith asserted that the illegal pools had existed for many years; that Zenith had conspiratorially been refused a license to import into Canada; and that litigation had been threatened and potential distributors discouraged. The conspiracy was said to have been not only a longstanding but also a worldwide one, against certain members of which the United States Government had brought an antitrust action and Zenith itself had recovered $10,000,000 in 1957 in settlement of a civil treble-damage action. But Zenith disclosed that, although the conspiracy had been worldwide and long existing, it would seek to recover damages for restraint of its trade in the three foreign markets only during the "four-year statutory damage period."

At trial Zenith introduced voluminous evidence with respect to the operations of the conspiracy and its impact on its business. The testimony with respect to Canada was that in a free market Zenith would have had the same share of the Canadian market as it enjoyed in the United States and that the existence and operation of the conspiracy had restricted its Canadian business. Specifically, Zenith claimed that in the four years after June 1, 1959, it had lost profits aggregating some $6,300,000 as the result of conspiratorial conduct by the Canadian patent pool during and prior to that period. Counsel made Zenith's position perfectly clear in his summation and post-trial brief: except for the Canadian pool, Zenith would have had a 16% share of the Canadian market, but as a result of the pool it had only a 3% share. Zenith thus argued that it was entitled to the full difference between 16% and 3% for the entire four-year period. It also made similar claims with respect to the English and Australian markets.

Although Zenith's counterclaim on its face sought to recover all damages suffered in past years without restriction,[1] HRI pleaded neither limitations nor release in its reply to the counterclaim. Zenith instead revealed its own awareness of the statutory limitation period during the trial and expressly restricted its proof to damages suffered during the statutory four-year damage period. However, Zenith sought to recover all damages suffered during those years even though it was unmistakably clear that some of this damage had been caused by conspiratorial action prior to 1959. Yet, at no time during the trial did HRI suggest that the statute barred Zenith's recovery of any part of its total damage suffered during that period. HRI did challenge Zenith's claim that it would have had a 16% share of the Canadian market on the ground that the evidence was speculative—indeed, that it was so speculative that Zenith had failed entirely to sustain its burden of proving damage, but it interposed no objection to Zenith's demand for all damages sustained during the four-year period, no matter when the operative acts had occurred. Not until one year after trial, when it learned that the judge's findings and conclusions were unfavorable, did HRI assert that part of the post-1959 damage was the result of pre-1959 conduct and was barred either by the statute of limitations or by the

[1] It is true that in its motion for leave to file its counterclaim, Zenith stated that the counterclaim arose out of conduct of HRI "occurring since the filing of the answer" in 1960. On the basis of this statement, HRI argues that Zenith precluded itself from recovering damages resulting from pre-answer conduct. This argument is not persuasive. The counterclaim itself was not so limited, and Zenith made its position on damages absolutely clear by the opening of trial. HRI was thereby given both ample notice of the substance of Zenith's claim and ample opportunity to respond, but made no effort during trial to do so.

release given by Zenith in 1957 in settlement of its suit against other American companies.[2]

Other than a general attack on the sufficiency of Zenith's proof of damages and a demand that the matter be relitigated, HRI's post-trial motion had three principal branches. First, it sought leave to file the defense of limitations. The motion in effect asserted that the conspiracy, even if it had continued during the damage period, had committed no damaging overt acts during that period, all of Zenith's damage being caused by pre-1959 operations of the pool. HRI asserted as a legal matter that the statute of limitations would therefore bar Zenith's entire claim on the record then before the Court. Second, HRI sought to interpose the defense of release. The argument was that some or all of Zenith's post-1959 damages were the consequence of pool activity occurring prior to the date of a 1957 release given to American companies which were coconspirators of HRI in the Canadian pool. That release, it was claimed, also released HRI. Third, HRI sought to reopen the record to show that until well into the four-year damage period Zenith's inability to enter the English and Australian markets was due to official embargoes, other governmental policies and technical difficulties rather than to the operations of the patent pools.

The motion was thoroughly and extensively argued. With respect to the defenses of limitations and release,

[2] Zenith similarly limited its claim for damages in the English and Australian markets to the years 1959–1963 and similarly sought to recover all damages suffered in those years without regard to the date of the conduct causing the damages. HRI again did not plead or argue that Zenith was not entitled to its full damages during those years in the two markets, until it moved after trial to set aside the judge's findings and to reopen the proof so that it could show that Zenith's exclusion from the markets prior to 1959 was a consequence of governmental restrictions and technical difficulties rather than of pool conduct.

the trial court's ruling, after Zenith objected to them as being "too late," was expressed as follows: "Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made." [3] This ruling was immediately followed by the court's refusal either to reopen the record for additional evidence with respect to Canada or to modify its judgment in any way as to that market. The record as to England and Australia, however, was reopened for further proof as to the operative forces other than the patent pools which in fact had prevented importation of Zenith's products into those markets.

Arguably, since the trial judge permitted the limitations and release defenses to be filed but then rejected them by refusing to amend the judgment with respect to Canada, rejection was necessarily on the merits. But the record also yields to the construction that the two defenses were overruled because a just and sensible ruling on their merits would have required a reopening of the record for a virtual retrial of the issue of damages, an eventuality which the trial court deemed unwarranted in view of HRI's delinquency in raising the defenses. If this was the course the trial judge took, we would not disturb his judgment.

At the time of the trial Rule 8 (c) of the Federal Rules of Civil Procedure required that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Rule 12 (h) at that time provided that "[a] party waives all defenses and objections which he does not present"

[3] The District Court gave HRI five days to file its amendments to the pleadings "nunc pro tunc as of" the date of the argument on HRI's motion. As a result, the defenses were technically filed prior to the entry of judgment and the taking of appeal, while the District Court still retained jurisdiction over the suit.

either by motion or in answer or reply. Based on these rules, Zenith claims that the trial court was required to, and did, hold the two defenses waived.

HRI contends that the District Court should have granted it leave to amend its answer under Rule 15 (a), which provides that such "leave shall be freely given when justice so requires." HRI's position is that the evidence in the record at the time it offered its defenses showed that all of the acts causing damage during the 1959–1963 period had occurred prior to 1959; from this it follows that Zenith had failed, according to HRI, to offer any evidence upon which an award of damages could have been sustained. In the alternative, HRI argues that the record showed that it had been released from all liability for damages flowing from pre-1957 acts.[4] In either case, HRI urges that the damage award be set aside.

It is settled that the grant of leave to amend the pleadings pursuant to Rule 15 (a) is within the discretion of the trial court. *Foman* v. *Davis*, 371 U. S. 178, 182 (1962) (dictum). In a matter as substantial and complex as this one, where HRI claimed it had been misled or at the very least asked to be relieved of mistake or oversight, it might have been within the discretion of the trial judge to have permitted HRI to amend its pleadings to include therein the defenses of limitations and release. But, in deciding whether to permit such an amendment,

[4] At the time HRI raised its defenses, the release on which it relied was not part of the record, although the record did contain a contract between the parties to the release in which they agreed to exchange releases, and frequent reference had been made during trial to the settlement of which the exchange of releases was a part. The record also belied HRI's claim that the conspiracy had been dormant during 1959–1963, for it contained a letter written in 1962 from the pool to a distributor of Motorola products in Canada threatening infringement suits if he continued to distribute American-made products of Motorola.

the trial court was required to take into account any prejudice that Zenith would have suffered as a result, see *Kanelos* v. *Kettler,* 132 U. S. App. D. C. 133, 136–137, n. 15, 406 F. 2d 951, 954–955, n. 15 (1968); *United States* v. *47 Bottles, More or Less,* 320 F. 2d 564, 573–574 (CA3 1963); *Caddy-Imler Creations* v. *Caddy,* 299 F. 2d 79, 84 (CA9 1962); 3 J. Moore, Federal Practice ¶ 15.08 [4] (2d ed. 1968), and here the prejudice to Zenith would have been substantial. Zenith's theory that all of its damages suffered during the four-year period were legally recoverable had been made quite clear during the trial, and Zenith had proved up its damages in accordance with that theory. Meanwhile HRI had neither pleaded its defenses, objected to Zenith's evidence, nor otherwise hinted that post-1959 damages caused by pre-1959 conduct were for any reason barred until long after the record had been closed. To have then sustained HRI's defenses would have been to deny Zenith the opportunity to prove its recoverable damages—a denial that hardly comports with the letter or the spirit of Rule 15 (a). At the very minimum, if the defense of limitations or release was to be entertained and deemed to bar that part of Zenith's damages resulting from the lingering consequences of past acts, Zenith would have been entitled to perfect its proof as to damage resulting from pool operations during the four-year period, as well as to prove, if it could, what damages it might have suffered in the future from those acts. To have permitted Zenith to perfect its proof would, of course, have required reopening of the record and a virtual retrial of the issue of damages.

The trial judge here might have permitted reopening. Like a motion under Rule 15 (a) to amend the pleadings, a motion to reopen to submit additional proof is addressed to his sound discretion. See, *e. g., Swartz* v. *New York Central R. Co.,* 323 F. 2d 713, 714 (CA7 1963);

Locklin v. *Switzer Bros.*, 299 F. 2d 160, 169–170 (CA9 1961); *Gas Ridge, Inc.* v. *Suburban Agricultural Properties, Inc.*, 150 F. 2d 363, 366, rehearing denied, 150 F. 2d 1020 (CA5 1945); 6A J. Moore, Federal Practice ¶ 59.04 [13] (2d ed. 1966). But the record is clear that he refused to reopen with respect to damages in the Canadian market or otherwise to modify the Canadian judgment, and that he thereby rejected HRI's proffered defenses. Although we are not privy to his unexpressed thinking and although his refusal can be read as a rejection of the defenses on the merits, it can also be read as a holding that the defenses were, in effect, waived by the untimeliness of their presentation and hence that the pleadings would not be amended, except as a matter of form, and that the trial would not be reopened.

On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matters that HRI had had an opportunity, but neglected, to litigate. Nor is it irrelevant in this connection that HRI's central claims during trial were that there was no conspiracy and that Zenith had suffered no damage at all. The defenses that HRI set out in the post-trial motions were in a sense inconsistent with these trial claims, for the defenses conceded, albeit only *arguendo*, that a conspiracy did exist and that Zenith, absent the conspiracy, would have controlled a sizable share of the Canadian market. HRI's post-trial argument, in effect, was one of confession and avoidance showing that the conspiracy had been so successful in the pre-1959 period that it could be relatively or entirely quiescent from 1959 to 1963 and nonetheless cause Zenith substantial damages in those years. It is quite possible that HRI knew exactly what it was doing in not presenting this argument during trial and that it realized a

need to present it only after it learned that its original arguments had not induced the court to hold in its favor.

Whatever HRI's reasons for not offering its limitations and release defenses during trial, however, the trial court would not have erred in concluding that they were waived.

II

Assuming, however, that the District Judge rejected the defenses of limitations and release on the merits, as the Court of Appeals held, we confront the issue of whether it is consistent with the controlling limitations statute, 15 U. S. C. § 15b, to permit Zenith to recover all of the damages it suffered during the years 1959–1963 even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim. HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period. We do not agree.

A

We turn first to Zenith's argument that, even if the statute of limitations were to be held applicable in this case, the statute was nonetheless tolled from November 24, 1958, to November 1, 1963,[5] pursuant to 15 U. S. C. § 16 (b) by reason of a Government antitrust action brought against various American companies

[5] On November 1, 1962, a consent decree was entered against the last defendant named in the Government action, which had been commenced on November 24, 1958, thereby terminating that action as to all parties. See *Barnett* v. *Warner Bros. Pictures Dist. Corp.*, 112 F. Supp. 5, 7 (ND Ill. 1953). For purposes of the present suit against HRI, which was not a party to the Government action, the running of the statute of limitations was thus tolled until November 1, 1963—one year after the entry of the consent decree. See 15 U. S. C. § 16 (b).

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participating along with HRI in the Canadian pool.[6] If Zenith is correct in this respect and the running of the statute of limitations was suspended during the pendency of the Government suit, then it was entitled at the very least to sue in 1963 for any damage to its business occurring by reason of conspiratorial conduct at any time after November 24, 1954.

The Court of Appeals rejected the tolling argument. It had some doubt whether tolling was properly before it since Zenith had never entered a formal plea of tolling, and HRI now contends that Zenith's failure to so plead in its original complaint bars it forever from raising such a claim. This contention is without merit. The cases on which HRI relies themselves establish that where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised. See *National & Transcontinental Trading Corp.* v. *International General Elec. Co.*, 15 F. R. D. 379, 382 (SDNY 1954). Cf. *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (CA2 1961). Nor should Zenith be penalized for failing to enter a formal plea of tolling in response to HRI's belated limitations plea, for Zenith can hardly be blamed for reading the remarks of the trial judge as a rejection of the limitations defense on the ground of waiver. Zenith was never unambiguously called upon to submit a formal plea; to hold under such circumstances that want of a submission amounts to a waiver would be to treat pleading as "a game of skill in

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[6] The Government suit was *United States* v. *General Electric Co.*, Civil Action No. 140–157, which was brought in the Southern District of New York. The complaint and the final judgment were introduced in evidence in the present proceedings as Plaintiff's Exhibits Nos. 44–47.

which one misstep by counsel may be decisive to the outcome"—an approach we have consistently rejected. See *Foman* v. *Davis, supra,* at 181–182; *United States* v. *Hougham,* 364 U. S. 310, 317 (1960); *Conley* v. *Gibson,* 355 U. S. 41, 48 (1957). The interests of justice thus clearly require that if HRI's limitations defense is to be considered on its merits, Zenith's claim of tolling must be dealt with as well.

The Court of Appeals did, in fact, consider the tolling issue on the merits, but concluded that tolling takes place only with respect to parties to a Government suit and hence that tolling did not occur here because HRI was not such a party. This was error. The language of 15 U. S. C. § 16 (b) expressly provides for tolling of the statute of limitations "in respect of *every* private right of action . . . based *in whole or in part* on any matter complained of" in the proceeding instituted by the Government. (Emphasis added.) On the face of this section, a private party who brings suit for a conspiracy against which the Government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the Government suit, even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the Government. If, that is, the Government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant had never been shown to be a conspirator by the evidence offered in the earlier Government suit, but then had been proved to be such in the subsequent private suit.

We find no indication in the legislative history of § 16 (b) that Congress intended it to toll the statute of limitations only against parties defendant in the Govern-

ment action. Nor is anything cited to us in this respect.[7] On the contrary, as we have said earlier, Congress, believing that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," enacted § 16 (b) in order to "assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 317–318 (1965). We see nothing destructive of Congress' purpose in holding that § 16 (b) tolls the statute of limitations against all participants in a conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein; indeed, to so hold materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits accruing therefrom.

It is true that the lower federal courts have until recently confined the operation of the section and held it applicable only to defendants named in the Government suit. See, *e. g.*, *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284, 290–292 (CA7 1954); *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37,

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[7] HRI does suggest that the 1955 amendment of § 16, see 69 Stat. 283, must be understood as an indication of Congress' approval of earlier cases in the lower federal courts confining the operation of § 16 (b) to parties defendant in Government suits. See text *infra*, this page and 337. We are unpersuaded. HRI can point to no direct evidence that Congress ever considered the issue now before us or voiced any views upon it; on the contrary, it appears that Congress left the matter for authoritative resolution in the courts. The true thrust of HRI's argument is that we must find congressional approval of the earlier cases in Congress' silence when it re-enacted the statute. We did not take such an approach, however, in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965), and *Leh* v. *General Petroleum Corp.*, 382 U. S. 54 (1965), and we do not do so here.

48 (CA1 1948). But these cases and others like them, as we have indicated, fly in the face of the language of the statute, are antithetical to its aims, and cannot be squared with our recent decisions in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra,* and *Leh* v. *General Petroleum Corp.,* 382 U. S. 54 (1965). *Minnesota Mining* held that § 16 (b)'s tolling provision was not confined to those situations in which a Government decree, by virtue of § 16 (a), would be prima facie evidence against defendants in a private suit who had also been named as defendants in a Government suit. It rejected the view that §§ 16 (a) and 16 (b) are wholly interdependent and coextensive; on the contrary, § 16 (b) was given its full sweep. *Leh,* following *Minnesota Mining,* held that a private litigant was entitled to the benefit of tolling although the conspiracy he alleged covered a different time, named additional parties, and excluded some parties named in the prior Government suit. While *Leh* did not explicitly decide whether the statute would be tolled when the sole defendant in a private action covering the same ground as an earlier Government suit had been named neither as a conspirator nor as a party in the Government suit, we do not believe that such a case could be distinguished from *Leh.* Cases in the lower federal courts since *Leh* have also come to this conclusion. See *New Jersey* v. *Morton Salt Co.,* 387 F. 2d 94 (CA3 1967); *Vermont* v. *Cayuga Rock Salt Co.,* 276 F. Supp. 970 (Me. 1967); *Michigan* v. *Morton Salt Co.,* 259 F. Supp. 35, 53–56 (Minn. 1966), aff'd *sub nom. Hardy Salt Co.* v. *Illinois,* 377 F. 2d 768 (CA8 1967).

We therefore hold that Zenith, although suing HRI, which was named neither as a party nor as a coconspirator in the Government suit, is not barred from obtaining the benefits of the tolling statute, since it is undisputed that the conspiracy in which HRI participated was at

least in part the same conspiracy as was the object of the Government's suit. From this it follows that the only issue still remaining upon HRI's limitations claim is whether Zenith can recover in its 1963 suit for damages suffered after June 1, 1959, as the consequence of pre-1954 conspiratorial conduct.

B

The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U. S. C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, *e. g.*, *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196, 208 (CA9 1950); *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (CA3 1917), appeal dismissed, 248 U. S. 595 (1919); *2361 State Corp.* v. *Sealy, Inc.*, 263 F. Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble-damage statute itself. 15 U. S. C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, *e. g.*, *Crummer Co.* v. *Du Pont*, 223 F. 2d 238, 247–248 (CA5 1955); *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, 158 F. Supp. 644, 648 (ED La. 1958); *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (Mass. 1942), aff'd, 172 F. 2d, at 49. However, each separate cause of action that so accrues entitles a plaintiff to

recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. See, *e. g., Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.,* 153 F. Supp. 589, 593 (NJ 1957); *Momand* v. *Universal Film Exchange, Inc., supra,* at 1006. Cf. *Lawlor* v. *Loewe,* 235 U. S. 522, 536 (1915). Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. *Moe Light, Inc.* v. *Foreman,* 238 F. 2d 817, 818 (CA6 1956); *Chicago & N. W. R. Co.* v. *De Clow,* 124 F. 142, 143 (CA8 1903); *Culley* v. *Pennsylvania R. Co.,* 244 F. Supp. 710, 715 (Del. 1965). Cf. *Howard* v. *Stillwell & Bierce Mfg. Co.,* 139 U. S. 199, 206 (1891).

In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted. Cf. *Schenley Industries* v. *N. J. Wine & Spirit Wholesalers Assn.,* 272 F. Supp. 872, 887–888 (NJ 1967);

Delta Theaters, Inc. v. *Paramount Pictures, Inc., supra,* at 648–649. Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement," *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968), and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public," *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957). See also *Lawlor* v. *National Screen Serv. Corp.*, 349 U. S. 322, 329 (1955).

As we have already seen, acceptance of Zenith's tolling argument requires further consideration only of that portion of Zenith's damages suffered during the 1959–1963 period as a result of pre-1954 conduct of the conspiracy. We must now determine whether Zenith could have recovered those damages if it had brought suit for them in 1954, for if it could not, it would follow for the reasons stated above that it must be permitted to recover them now.

We do not, of course, have the thinking of the district judge on this issue, and ordinarily the matter of future damages would very much depend on his informed discretion.[8] But we are reluctant to return any issue in this litigation for another round of proceedings in the trial or appellate courts if we can fairly dispose of it

[8] If the trial judge had passed upon the question, he well might have concluded that none of the damages sustained by Zenith in the Canadian market between 1959 and 1963 was a consequence of pre-1954 conspiratorial conduct. The trial judge in effect found that, as to England and Australia, the effects of conspiratorial conduct were no longer felt by Zenith more than four years after the conduct had occurred, and there is no reason to infer that his findings would have been different in regard to Canada either in the present suit or in a suit brought in 1954. But the trial judge made no such findings as to Canada, and we lack power to make them for him.

at this juncture. After due consideration, we have determined that in the circumstances of this case, § 15b was no bar to any part of the damages awarded Zenith by the District Court insofar as the Canadian market was concerned.

Let us assume that Zenith in a treble-damage suit brought in 1954 had presented evidence similar to that which it presented in the instant suit, indicating that it would have had the same share of a free Canadian market as it did in the United States market. Assume also that it had presented evidence to the effect that, starting in 1954, when it had no sales in the Canadian market, it would have taken 10 years to reach that share in a free market. Given such evidence, the question would be whether a district court would have permitted Zenith to recover estimated profits upon 90% of its share of the hypothetical free Canadian market for its anticipated losses in 1955, 80% for its losses in 1956, and 70% for its 1957 losses, and so on.[9]

We find it difficult to believe that Zenith could have convinced a District Court sitting in 1954 that, although it contemplated a free market from that time forward, it would still be suffering from provable injury more than five years later. It is true that the damages awarded Zenith in this case were based on estimates of its volume of business in a free market. But those estimates were for a past period of time; the size and conditions in the market were known and the competitive

[9] Of course, these percentages are purely hypothetical. They rest upon an assumption that, if Zenith had sued in 1954 for future damages in the Canadian market and had claimed that it would take 10 years for it to attain its full share of that market under free competitive conditions, then it would have proved that in 1955 it would have reached 10% of that share, in 1956, 20%, and so on. In each year it would have recovered damages for that percentage of the share which it had not yet attained.

forces were identifiable. Zenith's performance during the same period and under comparable conditions was a matter of record. It is quite another matter to predict market conditions and the performance of one competitor in that market five to 10 years hence. The proceedings before us put in stark relief the difficulties of proving the fact and the amount of damage during a period in the immediate past. Claims of future damage would have probably gotten short shrift in the lower courts if they had been pressed in this case. In our view, this is the very treatment such claims would have received had Zenith sued in 1954, and claimed damages for the decade of the sixties. The short of it is that Zenith asserted its cause of action for 1959–1963 damages well within the period during which § 15b entitled it to sue.

III

Entirely apart from its statute of limitations defense, HRI claims that whatever part of the 1959–1963 damages was caused by conspiratorial conduct prior to 1957 is unrecoverable because of a release executed in that year by Zenith in settlement of an antitrust action against other coconspirators in the Canadian patent pool.[10] The

[10] The text of the release was as follows:

"To All To Whom These Presents Shall Come Or May Concern, Greeting: Know ye, That Zenith Radio Corporation and The Rauland Corporation, each a corporation organized and existing under and by virtue of the laws of the State of Illinois, for and in consideration of the sum of One Dollar ($1.00) lawful money of the United States of America and other good and valuable consideration, to them in hand paid by *....., the receipt whereof is hereby acknowledged, have each remised, released and forever discharged, and by these presents does each for itself and its respective subsidiaries, successors and assigns remise, release and forever discharge the said *..... and its subsidiaries and their respective successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialities, covenants, contracts,

release extended not only to past but also to all future damages arising out of pre-1957 conspiratorial acts. However, while it was a coconspirator in the Canadian pool, HRI was neither a party to the 1957 suit nor a party to the release, nor was it named in the release as one of the parties affected thereby. Nonetheless, the Court of Appeals held HRI entitled to the benefits of the release on the ground that Zenith had failed expressly to reserve any rights against HRI, and it therefore remanded the case to the District Court with directions to exclude from the judgment any damages caused by pre-1957 conduct. We again conclude that the Court of Appeals erred.

Three rules have developed to deal with the question whether the release of one joint tortfeasor releases other tortfeasors who are not parties to or named in the release. The ancient common-law rule, which was grounded upon a formalistic doctrine that a release extinguished the cause of action to which it related, was that a release of one joint tortfeasor released all other parties jointly liable, regardless of the intent of the parties. See, *e. g.*, *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94,

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controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against said *....., its subsidiaries and their respective successors and assigns, said Zenith Radio Corporation and The Rauland Corporation and each of them ever had, now has or which each of them and their respective subsidiaries, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, not including however, claims, if any, for unpaid balances on any goods sold and delivered.

"*Insert

" 'Radio Corporation of America,' or

" 'General Electric Company,' or

" 'Western Electric Company.'

"This release may not be changed orally."

95 (CA6 1937); *American Ry. Express Co.* v. *Stone*, 27 F. 2d 8, 10 (CA1 1928); *Barrett* v. *Third Avenue R. Co.*, 45 N. Y. 628, 635 (1871); *Ellis* v. *Esson*, 50 Wis. 138, 146, 6 N. W. 518, 519 (1880). While this Court has referred to this rule in cases where the rights of the litigants were controlled by state or federal common law, see *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452, 456–457 (1915); *United States* v. *Price*, 9 How. 83, 92 (1850); *Hunt* v. *Rhodes*, 1 Pet. 1, 16 (1828); we are cited to no case where we have applied the rule to a statutory cause of action created under federal law. Indeed, we have expressly repudiated the rule. See *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476, 501 (1964). Cf. *Birdsell* v. *Shaliol*, 112 U. S. 485, 489 (1884). Moreover, in the lower federal courts, causes of action based upon federal statutes have generally been governed by one of the other two rules. The first of these rules provides that, although a release of one coconspirator normally releases all others, it will not have such an effect if a plaintiff expressly reserves his rights against the others. This rule, which has been adopted with some variation by statute in 21 States,[11] by judicial decision in others, see, *e. g.*, *Mc-*

[11] The Model Joint Obligations Act, 9B U. L. A. 355, which has been adopted in regard to tort claims by four States, is most similar to the rule stated in the text. It provides that a release of an obligor shall release co-obligors to the full extent of the obligor's original liability, § 5 (a), unless the amount of that liability is not known to the obligee, § 5 (b), or the obligee expressly reserves his rights against the co-obligors. § 4. The four States adopting the act are Nevada, Nev. Rev. Stat., c. 101 (1967); New York, N. Y. General Obligations Law §§ 15–101 to 15–109 (1964); Utah, Utah Code Ann. §§ 15–4–1 to 15–4–7 (1953); Wisconsin, Wis. Stat. §§ 113.01 to 113.10 (1967).

The Uniform Contribution among Tortfeasors Act, 9 U. L. A. 233, reverses the presumption arising from the absence of an express provision in the release. It enacts that "[a] release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors unless the release so provides . . . ." § 4. The eight States that

Kenna v. *Austin*, 77 U. S. App. D. C. 228, 233–234, 134 F. 2d 659, 664–665 (1943) (announcing D. C. law); *Riley* v. *Industrial Finance Service Co.*, 157 Tex. 306, 311, 302 S. W. 2d 652, 655 (1957); and by the First Restatement, see Restatement, Torts § 885 (1) (1939); has been applied in a number of antitrust cases. See, *e. g.*, *Miami Parts & Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F. 2d 83, 84 (CA5 1968); *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F. 2d 925, 931 (CA9 1965); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5, 6–7 (CA3 1957). It was this rule that the Court of Appeals followed in the opinion below. A final rule, which has gained support in several recent decisions and been adopted by the American Law Institute in a tentative draft of the Second Restatement of Torts, provides that the effect of a release upon coconspirators shall be determined in accordance with the intentions of the parties. See *Winchester Drive-In Theatre, Inc.* v. *Twentieth Century-Fox Film Co.*, 232 F. Supp. 556, 561–563 (ND Cal. 1964),

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have adopted the Uniform Act are Arkansas, Ark. Stat. Ann. §§ 34–1001 to 34–1009 (1947); Delaware, Del. Code Ann., Tit. 10, §§ 6301–6308 (1953); Hawaii, Hawaii Rev. Laws §§ 246–10 to 246–16 (1955); Maryland, Md. Ann. Code, Art. 50, §§ 16 to 24 (1957); New Mexico, N. M. Stat. Ann. §§ 24–1–11 to 24–1–18 (1953); Pennsylvania, Pa. Stat. Ann., Tit. 12, §§ 2082–2089 (1967); Rhode Island, R. I. Gen. Laws Ann. §§ 10–6–1 to 10–6–11 (1956); South Dakota, S. D. Comp. Laws §§ 15–8–11 to 15–8–22 (1967). Two States—Massachusetts and North Dakota—have adopted a slightly different 1955 revision of the Act. See Mass. Gen. Laws Ann., c. 231B, §§ 1–4 (Supp. 1971); N. D. Cent. Code §§ 32–38–01 to 32–38–04 (1960). Other States adopting statutes affecting the common law of release are Alabama, Ala. Code, Tit. 7, § 381 (1940); California, Cal. Code Civ. Proc. §§ 875–880 (Supp. 1970); Louisiana, La. Civ. Code Ann., Art. 2203 (1952); Michigan, Mich. Stat. Ann. § 27A.2925 (1962); Missouri, Mo. Rev. Stat. § 537.060 (1953); Montana, Mont. Rev. Codes Ann. § 93–8108 (1964); West Virginia, W. Va. Code Ann. § 55–7–12 (1966). The statutes last listed deal generally with the construction of instruments in suit and with the effect and form of releases in particular.

rev'd, *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc., supra; Young* v. *State,* 455 P. 2d 889 (Alaska, 1969); *Breen* v. *Peck,* 28 N. J. 351, 146 A. 2d 665 (1958); Restatement (Second), Torts § 885 (1) (Tent. Draft No. 16, 1970); 12 Vand. L. Rev. 1414, 1416–1417 (1959).

We recently adopted the final rule giving effect to the intentions of the parties in *Aro Mfg. Co.* v. *Convertible Top Co., supra,* a patent infringement case. The agreement in that case expressly provided for the release of "Ford, its associated companies . . . [and] its and their dealers, customers and users of its and their products" from all past and future infringement claims. 377 U. S., at 493. The document, however, did not expressly reserve the releasor's rights against anyone. The issue in the case was whether Aro, a contributory infringer which did not fit within any of the special categories enumerated in the release, was nonetheless liable for its past contribution to infringements. The District Court had found that the parties had not intended to release contributory infringers such as Aro, and, despite the absence of an express reservation of rights against such infringers, we accordingly held that Aro was not entitled to benefit from the release. We concluded that a release, "which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights." *Id.,* at 501.

We perceive no reason to follow a different rule in antitrust litigation. Indeed, of the three available rules, the rule adopted in *Aro* is most consistent with the aims and purposes of the treble-damage remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; often, defendants who have conspired together must be sued in a number of different States if all are to be reached, and, while defendants in some States may

be willing to enter into settlements, defendants in others may not. To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys. The straightforward rule is that a party releases only those other parties whom he intends to release. Our conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them, and its adoption of the rule to which we adhere. See Restatement (Second), Torts § 885, Comments *a–d* (Tent. Draft No. 16, 1970).

The intention of the parties to the 1957 release is absolutely clear from the contract made prior thereto in which they agreed to exchange releases.[12] That contract expressly provided for releases "to bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."[13] We accordingly have no hesitancy in

[12] Resort may be had to the contract in construing the release since the parole evidence rule is usually understood to be operative only as to parties to a document, and HRI here was not a party to the release. See *Stern* v. *Commissioner*, 137 F. 2d 43, 46 (CA2 1943); *O'Shea* v. *New York, C. & St. L. R. Co.*, 105 F. 559, 562–563 (CA7 1901); Restatement (Second), Torts § 885, Comment *d* (Tent. Draft No. 16, 1970). See generally 9 J. Wigmore, Evidence § 2446 (3d ed. 1940).

[13] The contract provided in relevant part:

"1. . . . RCA, GE and Western Electric each to grant Zenith and Rauland, respectively, a general release and Zenith and Rauland each to grant RCA, GE and Western Electric, respectively, a general release, each such release, to the extent either party may request, to bind or benefit the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."

holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

Of course, to the extent that the $10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959–1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959–1963 damages inflicted by all the members of the pool. It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment. See *Aro Mfg. Co.* v. *Convertible Top Co., supra,* at 502–503 (plurality view); *McKenna* v. *Austin, supra,* at 234, 134 F. 2d, at 665; Restatement, Torts § 885 (3) (1939); W. Prosser, Torts § 46 (3d ed. 1964). However, the record below indicates that a defense of payment could not here be sustained for, while the 1957 release did extend to future damages, the undisputed and unimpeached testimony of Zenith's witnesses was that the $10,000,000 settlement was understood by the parties as compensation only for Zenith's damages up to the date of the release. Thus, it is not surprising that, although HRI did advance a claim of payment upon its post-trial motion in the District Court, it has made no such argument in this Court. Since the claim was untimely presented below, was not pressed here, and is not sustainable on the facts contained in the record, we see no basis for its further consideration.

The judgment of the Court of Appeals is reversed, and

the case is remanded, with instructions that the Court of Appeals reinstate the judgment of the District Court with respect to the Canadian market.

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in the result.

My review of the record in this case has left me with the firm conviction that the trial judge rejected Hazeltine's proffered defenses of release and the statute of limitations on the ground that they were too belatedly raised. I agree with the Court that such a course was within the trial judge's sound discretion. I therefore find it unnecessary to express any view on the remaining, difficult issues which the Court discusses.

A consideration of the posture of the case at the time of the trial judge's ruling facilitates an understanding of the record. Two years after the filing of Zenith's counterclaim, one year after the close of evidence, nine months after the filing of Hazeltine's post-trial brief, and two months after the trial judge had made preliminary findings of fact and conclusions of law, Hazeltine, represented by new counsel, raised for the first time its defenses of release and the statute of limitations. It also sought to dispute the quality and the sufficiency of the proof of damages with respect to the Canadian market, and it raised the issue of governmental embargoes in the English and Australian markets.

The District Judge heard two days of argument, covering nearly 200 pages of the Appendix, on both the merits of the contentions and the equity of allowing Hazeltine to raise them so belatedly. There were three main links in the chain of Hazeltine's reasoning in support of its contention that it should be allowed the benefit of the release and the statute of limitations. First, the defenses were meritorious and would bar a large portion of the enormous potential recovery. Second, Hazeltine's late-

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ness in raising the defenses should be excused because Zenith's counterclaim and supporting affidavit gave no notice that Zenith intended to rely on any activities occurring before the filing of the answer in 1961, which was well within the limitation period under any theory. Third, Hazeltine should be excused for failing to spot the alleged shift in Zenith's theory of recovery during the course of the trial because Hazeltine's trial counsel was primarily a patent lawyer who was not completely at home in the antitrust field. App. 68–69, 72–74, 156–162.

The District Judge on at least three occasions observed that Hazeltine had been put on notice of Zenith's theory by the allegations of the counterclaim itself and by the pretrial briefs.[1] He repeatedly commented on trial counsel's failure to raise the defenses of release and the statute of limitations,[2] and in the course of colloquy more

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[1] For example: "Mr. Kayser [Hazeltine's counsel]: . . . it was not until during the trial, after we had the long Dodds affidavit and all of this testimony that suddenly, gradually this new theory starts to creep in, this new theory where we go back and try to recover again based on these allegedly wrongful acts many, many years ago.

"The Court: I must assume, to go along with that, that counsel at that time didn't read the pretrial brief which clearly set out, prior to the trial, this theory that you were taken by surprise by during the course of the trial." App. 158. See also App. 87, 144.

[2] For example: "The Court: . . . [Reads from Hazeltine's post-trial brief.]

"Do you differ with counsel's statement, your prior counsel's statement 90 days after proofs were closed?

"Mr. Kayser: As to what the issues were that were presented in this case, yes, your Honor, I do. I most definitely do.

"The Court: Of course, you know by now that this is a new theory on your behalf.

"Mr. Kayser: Your Honor, I don't think it is a new theory. I think that——

"The Court: I mean, at least it wasn't advanced in this brief filed June 8, 90 days after the proofs closed.

"Mr. Kayser: Your Honor, we fully recognize the fact that the

directly addressed to Hazeltine's other contentions he emphasized the necessity for trial counsel to prepare his case if the client was not to suffer.[3] After counsel for

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trial counsel did not realize what was happening to him. We fully realize that fact. If we had realized it——

"The Court: I mean, he didn't even realize it 90 days after the proofs were over.

"Mr. Kayser: Yes, your Honor. I quite agree." App. 72.

Later the following colloquy occurred:

"The Court: Do you agree with the theory that sometime litigation must end?

"Mr. Kayser: Yes, your Honor.

"The Court: And these offers of proof [with respect to embargoes by the English and Australian Governments] are now being made more than one year after the proof closed on this case?

"Mr. Kayser: Your Honor, this I think is one of the most unusual cases that will come into a Courtroom, in that we have here, as I think we can demonstrate—without basis we have here the danger of a judgment of almost forty-nine million dollars which will spell corporate death, which is subject to the affirmative defenses of limitations and of releases. . . .

"The Court: I just got through instructing a jury that in deliberating on their verdict, they should not take into consideration either sympathy or prejudice.

. . . . . .

"Mr. Kayser: I submit most respectfully to this court that this court should take into account equity. This is not a matter of sympathy. This is a matter of equity and a matter of justice; that this judgment, which will spell the death of this corporation, has had absolutely no basis whatsoever. It is subject to affirmative defenses. It was accomplished by a subtle switch in theory. Maybe it should have been caught; maybe it shouldn't. But is your Honor going to penalize this corporation——

"The Court: I mean, it wasn't even caught 90 days after the proofs closed.

"Mr. Kayser: I agree, that's true. I agree. This is a very unusual case; we recognize that.

"The Court: You may proceed." App. 108–109. See also App. 71–76 *passim*, 158–161.

[3] For example: "The Court: . . . underlying what you are saying [with respect to the embargoes] is what is said so frequently in

Zenith had presented his argument,[4] the District Judge heard Hazeltine's rebuttal, App. 223–250, with only one substantive question: "You do agree that the statute of limitations can be waived. You agree to that, don't you?" App. 237.

At the conclusion of his rebuttal argument, Hazeltine's attorney moved for leave to file "our affirmative defenses as a formal pleading of release and statute of limitations," and also moved to dismiss the counterclaim on the basis of those defenses. App. 250. The following colloquy then occurred:

> "The Court: Mr. McConnell [Zenith's counsel], do you care to address yourself very briefly to those two motions he just made? You will be limited to that.
>
> "Mr. Kayser: Sir?

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appeals in criminal cases, that they are where they are by virtue of incompetence of counsel.

"Now, there a person's liberty is involved, and what do the courts say in regard to this plea of incompetency of counsel?

"They say, first, was he counsel of your choice rather than appointed counsel? And if he was, the courts say, in regard to keeping men incarcerated and depriving them of their liberty, that unless the trial conducted by counsel of the prisoner's choice was such a farce, such a fraud that justice would be horrified by the result, that since you are represented by counsel of your choice, why, agreed that he might not be the greatest in the world, but he was your lawyer and you picked him out. You are going to have to remain incarcerated for the balance of your term.

"Now, how do we get around that analogy in this case?" App. 140–141.

Hazeltine's attorney responded in terms of his theory of surprise, whereupon the District Judge answered that federal procedure was based on notice pleading and in his opinion Hazeltine had been put on notice. App. 141–144.

See also, *e. g.*, App. 116, 121–123, 146, 155.

[4] App. 169–223. The District Judge asked for Zenith's views on the merits of the proposed defenses, but he did not press counsel on his reply. App. 186, 189, 193.

"The Court: Mr. McConnell—the ones that have to do with seeking to file these new pleadings on the statute of limitations.

"Mr. McConnell: Well, the statute of limitations—this case is clearly distinguishable from the Emich case——

"The Court: All he is doing is asking leave to file, and that is the only thing I wish to have you address yourself to.

"Mr. McConnell: I think it's too late. He can make it for the record, but to actually file them in this case, the record is made. The case has been closed.

"The Court: Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made."

[The District Judge then stated how much he had enjoyed the argument of the past two days and complimented counsel on their presentations.]

"The Court at this time is prepared to enter the final judgment and decree offered with the exception of . . . [the damages allegedly suffered in England and Australia.]" App. 250–251.

The judge then indicated that he would reopen the record to receive additional evidence with regard to the embargoes in England and Australia, but that the scope of the inquiry would be narrowly limited, and in particular no relitigation of facts adduced at trial would be permitted. The judge explained, "I do feel that in order to satisfy myself, in order to do equity in this matter, that I would like, to the limited extent expressed, a reopening in regard to the matters that I have indicated that do trouble me by virtue of the offers of proof that have been made and the statements that have been made in regard solely to Australia and England." App. 252–253. Except for giving Hazeltine's counsel five days

in which to file his affirmative defenses, the judge made no other relevant comments in ruling on the motions.

I find it impossible to believe that the judge ruled thus summarily on the merits of the complicated issues of antitrust law to which this Court devotes 15 printed pages. I also find it highly unlikely that, without a word of explanation for departing from the sentiments he expressed during argument, the judge intended to forgive Hazeltine's failure to raise the defenses earlier. To be sure, he must have considered the merits sufficiently to satisfy himself that refusal to allow Hazeltine to raise these defenses worked no gross inequity. See Fed. Rule Civ. Proc. 15 (a). I remain convinced, however, that he rejected the defenses only as untimely raised.

Believing that the Court of Appeals clearly erred in reaching the opposite conclusion,[5] I concur in the judgment of the Court on that ground.

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[5] The opinion of the Court of Appeals gives no indication that its attention was drawn to the remarks of the District Judge during Hazeltine's argument in chief, which cast light on his ruling on the motion for leave to file. Its entire discussion of the basis for the District Court's action reads as follows:

"Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived. The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. . . . [The Supreme Court left open the question whether this ruling was on the merits.] It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery." 418 F. 2d, at 23–24.

Syllabus

RELFORD *v.* COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 98. Argued December 15–16, 1970—Decided February 24, 1971

Petitioner, then an Army corporal, was convicted in 1961 by a general court-martial for violating Articles 134 and 120 of the Uniform Code of Military Justice by kidnaping and raping, within the bounds of a military reservation, two women—one, who was waiting for her serviceman brother who was visiting the base hospital; the other, who was on her way from the home on the base where she lived with her serviceman husband to the post exchange where she worked. In this habeas corpus proceeding the Court granted certiorari on the issue of the retroactivity and scope of *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), which held that a court-martial had no jurisdiction to try a member of the armed forces charged with attempted off-post rape of a civilian and related offenses since such crimes were not "service connected." *Held:*

1. Though some of the factors are present here that the Court relied on for its result in *O'Callahan* (the offenses were committed in peacetime within this country's territory, did not relate to the accused's military duties, were traditionally cognizable in civilian courts (which were available to try them), and did not directly flout military authority or violate military property), this case significantly differs from *O'Callahan* in that the crimes there were committed by a serviceman away from his base against a victim who had no connection with the base, whereas here the crimes were committed on the base against women properly there, one of whom was returning to her work on the base when the attack occurred. Pp. 364–365.

2. An offense committed by a serviceman on a military post that violates the security of a person or of property there is service connected and may be tried by a court-martial. Pp. 367–369.

3. The question of *O'Callahan*'s retroactivity is not decided. Pp. 369–370.

409 F. 2d 824, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Judson W. Detrick, by appointment of the Court, 397 U. S. 1020, argued the cause and filed briefs for petitioner.

Solicitor General Griswold argued the cause for respondent. With him on the brief were *Assistant Attorney General Wilson*, *Deputy Solicitor General Springer*, *Beatrice Rosenberg*, and *Roger A. Pauley*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In *O'Callahan* v. *Parker*, 395 U. S. 258, decided June 2, 1969, by a five-to-three vote, the Court held that a court-martial may not try a member of our armed forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory, when the soldier was on leave, and when the charges could have been prosecuted in a civilian court. What is necessary for a court-martial, the Court said, is that the crime be "service connected." 395 U. S., at 272.

O'Callahan's military trial, of course, was without those constitutional guarantees, including trial by jury, to which he would have been entitled had he been prosecuted in a federal civilian court in the then Territory of Hawaii where the alleged crimes were committed.

O'Callahan already has occasioned a substantial amount of scholarly comment.[1] Much of it characterizes the decision as a significant one because it is said to depart from long-established, or at least long-accepted,

[1] Everett, *O'Callahan* v. *Parker*—Milestone or Millstone in Military Justice?, 1969 Duke L. J. 853; McCoy, Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker, 16 N. Y. L. F. 1 (1970); Nelson & Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1 (1969); Wilkinson, The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v.

concepts. Some of the literature is generally approving.[2] Some of it is generally critical.[3] Some of it, as did the *O'Callahan* dissent, 395 U. S., at 284, forecasts a period of confusion for both the civil and the military courts.[4] Not surprisingly, much of the literature is concerned with the issue of *O'Callahan*'s retrospectivity. Some writers assert that the holding must be applied retroactively.[5] Others predict that it will not be so applied.[6] Naturally enough, *O'Callahan* has had its ref-

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Parker, 9 Washburn L. J. 193 (1970); Wurtzel, *O'Callahan* v. *Parker:* Where Are We Now?, 56 A. B. A. J. 686 (1970); The Supreme Court 1968 Term, 83 Harv. L. Rev. 7, 212–220 (1969); O'Callahan v. Parker, 395 U. S. 258 (1969): New Limitation on Court-Martial Jurisdiction, 61 J. Crim. L. C. & P. S. 195 (1970); Comment, 22 Baylor L. Rev. 64 (1970); Comment, 18 J. Pub. L. 471 (1969); Comment, 21 Mercer L. Rev. 311 (1969); Comment, 7 San Diego L. Rev. 55 (1970); Comment, 15 Vill. L. Rev. 712 (1970); Comment, 21 S. C. L. Rev. 781 (1969); Note, 70 Col. L. Rev. 1262 (1970); Note, 18 Kan. L. Rev. 335 (1970); Note, 3 Loyola U. L. Rev. 188 (1970); Note, 24 U. Miami L. Rev. 399 (1970); Note, 68 Mich. L. Rev. 1016 (1970); Note, 48 N. C. L. Rev. 380 (1970); Note, 64 Nw. U. L. Rev. 930 (1970); Recent Cases, 49 Ore. L. Rev. 237 (1970); Note, 23 Sw. L. J. 948 (1969); Note, 37 Tenn. L. Rev. 421 (1970); Note, 44 Tul. L. Rev. 417 (1970); 36 Brooklyn L. Rev. 259 (1970); 19 Buffalo L. Rev. 400 (1970); 38 Geo. Wash. L. Rev. 170 (1969); 31 Ohio St. L. J. 630 (1970); 22 Vand. L. Rev. 1377 (1969).

[2] McCoy, *supra;* 61 J. Crim. L. C. & P. S. 195; Note, 18 Kan. L. Rev. 335; 19 Buffalo L. Rev. 400; Comment, 18 J. Pub. L. 471.

[3] Everett, *supra;* Nelson & Westbrook, *supra;* Wilkinson, *supra;* Wurtzel, *supra;* Comment, 15 Vill. L. Rev. 712; Note, 24 U. Miami L. Rev. 399; 38 Geo. Wash. L. Rev. 170; 22 Vand. L. Rev. 1377.

[4] Comment, 22 Baylor L. Rev. 64; Comment, 18 J. Pub. L. 471; Note, 18 Kan. L. Rev. 335; Note, 23 Sw. L. J. 948; Note, 24 U. Miami L. Rev. 399; 31 Ohio St. L. J. 630.

[5] Wilkinson, *supra;* Comment, 22 Baylor L. Rev. 64; Note, 64 Nw. U. L. Rev. 930.

[6] Nelson & Westbrook, *supra;* Comment, 21 S. C. L. Rev. 781; Note, 3 Loyola U. L. Rev. 188, 198 n. 67; 44 Tul. L. Rev. 417, 424.

erences in the federal courts of appeals[7] and in a significant number of cases in the United States Court of Military Appeals.[8]

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[7] See, *e. g.*, *Latney* v. *Ignatius*, 135 U. S. App. D. C. 65, 416 F. 2d 821 (1969); *Harris* v. *Ciccone*, 417 F. 2d 479, 488 (CA8 1969), cert. denied, 397 U. S. 1078; *Gallagher* v. *United States*, 191 Ct. Cl. 546, 423 F. 2d 1371 (1970), cert. denied, 400 U. S. 849; *Silvero* v. *Chief of Naval Air Basic Training*, 428 F. 2d 1009 (CA5 1970); *King* v. *Moseley*, 430 F. 2d 732 (CA10 1970); *Zenor* v. *Vogt*, 434 F. 2d 189 (CA5 1970).

[8] *United States* v. *Borys*, 18 U. S. C. M. A. 547, 40 C. M. R. 259 (1969); *United States* v. *Prather*, 18 U. S. C. M. A. 560, 40 C. M. R. 272 (1969); *United States* v. *Beeker*, 18 U. S. C. M. A. 563, 40 C. M. R. 275 (1969); *United States* v. *DeRonde*, 18 U. S. C. M. A. 575, 40 C. M. R. 287 (1969); *United States* v. *Boyd*, 18 U. S. C. M. A. 581, 40 C. M. R. 293 (1969); *United States* v. *Cochran*, 18 U. S. C. M. A. 588, 40 C. M. R. 300 (1969); *United States* v. *Chandler*, 18 U. S. C. M. A. 593, 40 C. M. R. 305 (1969); *United States* v. *Crapo*, 18 U. S. C. M. A. 594, 40 C. M. R. 306 (1969); *United States* v. *Harris*, 18 U. S. C. M. A. 596, 40 C. M. R. 308 (1969); *United States* v. *Castro*, 18 U. S. C. M. A. 598, 40 C. M. R. 310 (1969); *United States* v. *Henderson*, 18 U. S. C. M. A. 601, 40 C. M. R. 313 (1969); *United States* v. *Riehle*, 18 U. S. C. M. A. 603, 40 C. M. R. 315 (1969); *United States* v. *Williams*, 18 U. S. C. M. A. 605, 40 C. M. R. 317 (1969); *United States* v. *Paxiao*, 18 U. S. C. M. A. 608, 40 C. M. R. 320 (1969); *United States* v. *Smith*, 18 U. S. C. M. A. 609, 40 C. M. R. 321 (1969); *United States* v. *Shockley*, 18 U. S. C. M. A. 610, 40 C. M. R. 322 (1969); *United States* v. *Rose*, 19 U. S. C. M. A. 3, 41 C. M. R. 3 (1969); *United States* v. *Armstrong*, 19 U. S. C. M. A. 5, 41 C. M. R. 5 (1969); *United States* v. *Rego*, 19 U. S. C. M. A. 9, 41 C. M. R. 9 (1969); *United States* v. *Camacho*, 19 U. S. C. M. A. 11, 41 C. M. R. 11 (1969); *United States* v. *Cook*, 19 U. S. C. M. A. 13, 41 C. M. R. 13 (1969); *United States* v. *Armes*, 19 U. S. C. M. A. 15, 41 C. M. R. 15 (1969); *United States* v. *Morisseau*, 19 U. S. C. M. A. 17, 41 C. M. R. 17 (1969); *United States* v. *Peak*, 19 U. S. C. M. A. 19, 41 C. M. R. 19 (1969); *United States* v. *Plamondon*, 19 U. S. C. M. A. 22, 41 C. M. R. 22 (1969); *United States* v. *Sharkey*, 19 U. S. C. M. A. 26, 41 C. M. R. 26 (1969); *United States* v. *Weinstein*, 19 U. S. C. M. A. 29, 41 C. M. R. 29 (1969); *United States* v. *Allen*, 19 U. S. C. M. A. 31, 41 C. M. R. 31

In the present federal habeas corpus case, instituted several years after the applicant's conviction by court-martial, certiorari was granted "limited to retroactivity

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(1969); *United States* v. *Safford*, 19 U. S. C. M. A. 33, 41 C. M. R. 33 (1969); *United States* v. *Frazier*, 19 U. S. C. M. A. 40, 41 C. M. R. 40 (1969); *United States* v. *Nichols*, 19 U. S. C. M. A. 43, 41 C. M. R. 43 (1969); *United States* v. *Hallahan*, 19 U. S. C. M. A. 46, 41 C. M. R. 46 (1969); *United States* v. *Huff*, 19 U. S. C. M. A. 56, 41 C. M. R. 56 (1969); *United States* v. *Keaton*, 19 U. S. C. M. A. 64, 41 C. M. R. 64 (1969); *United States* v. *Easter*, 19 U. S. C. M. A. 68, 41 C. M. R. 68 (1969); *United States* v. *Stevenson*, 19 U. S. C. M. A. 69, 41 C. M. R. 69 (1969); *United States* v. *Everson*, 19 U. S. C. M. A. 70, 41 C. M. R. 70 (1969); *United States* v. *Fryman*, 19 U. S. C. M. A. 71, 41 C. M. R. 71 (1969); *United States* v. *Higginbotham*, 19 U. S. C. M. A. 73, 41 C. M. R. 73 (1969); *United States* v. *Adams*, 19 U. S. C. M. A. 75, 41 C. M. R. 75 (1969); *United States* v. *Wysingle*, 19 U. S. C. M. A. 81, 41 C. M. R. 81 (1969); *United States* v. *Gill*, 19 U. S. C. M. A. 93, 41 C. M. R. 93 (1969); *United States* v. *McGonigal*, 19 U. S. C. M. A. 94, 41 C. M. R. 94 (1969); *United States* v. *Fields*, 19 U. S. C. M. A. 119, 41 C. M. R. 119 (1969); *United States* v. *Bryan*, 19 U. S. C. M. A. 184, 41 C. M. R. 184 (1970); *United States* v. *Blackwell*, 19 U. S. C. M. A. 196, 41 C. M. R. 196 (1970); *Mercer* v. *Dillon*, 19 U. S. C. M. A. 264, 41 C. M. R. 264 (1970); *United States* v. *Peterson*, 19 U. S. C. M. A. 319, 41 C. M. R. 319 (1970); *Gosa* v. *United States*, 19 U. S. C. M. A. 327, 41 C. M. R. 327 (1970); *Wright* v. *United States*, 19 U. S. C. M. A. 328, 41 C. M. R. 328 (1970); *Hooper* v. *Laird*, 19 U. S. C. M. A. 329, 41 C. M. R. 329 (1970); *United States* v. *Haagenson*, 19 U. S. C. M. A. 332, 41 C. M. R. 332 (1970); *In re Watson*, 19 U. S. C. M. A. 401, 42 C. M. R. 3 (1970); *Brant* v. *United States*, 19 U. S. C. M. A. 493, 42 C. M. R. 95 (1970); *United States* v. *Daniels*, 19 U. S. C. M. A. 529, 42 C. M. R. 131 (1970); *United States* v. *Wills*, 20 U. S. C. M. A. 8, 42 C. M. R. 200 (1970); *United States* v. *Lovejoy*, 20 U. S. C. M. A. 18, 42 C. M. R. 210 (1970); *United States* v. *Ortiz*, 20 U. S. C. M. A. 21, 42 C. M. R. 213 (1970); *United States* v. *Hargrave*, 20 U. S. C. M. A. 27, 42 C. M. R. 219 (1970); *United States* v. *Davis*, 20 U. S. C. M. A. 27, 42 C. M. R. 219 (1970); *United States* v. *Snyder*, 20 U. S. C. M. A. 102, 42 C. M. R. 294 (1970); *United States* v. *Morley*, 20 U. S. C. M. A. 179, 43 C. M. R. 19 (1970).

and scope of *O'Callahan* v. *Parker* . . . ." 397 U. S. 934 (1970). We thus do not reconsider *O'Callahan*. Our task here concerns only its application.

I

Isiah Relford, in 1961, was a corporal on active duty in the United States Army. He was stationed at Fort Dix, New Jersey.

On September 4, 1961, the visiting 14-year-old sister of another serviceman, who was on leave from his Army station at Fort Campbell, Kentucky, and who came to Fort Dix when his wife delivered a child at the base hospital, was abducted at the point of a knife from an automobile in the hospital's parking lot as she waited for her brother. The girl was raped by her abductor.

A few weeks later, on October 21, the wife of an Air Force man stationed at McGuire Air Force Base, adjacent to Fort Dix, was driving from her home on the base to the post exchange concession, also on the base, where she worked as a waitress. As the woman slowed her automobile for a stop sign, a man gained entry to the car from the passenger side and, with a knife at her throat, commanded the woman to drive on some distance to a dirt road in the fort's training area. She was raped there.

The second victim, with her assailant still in the automobile, was able to make her predicament known to military police. The assailant was apprehended and turned out to be Relford. He immediately admitted consensual intercourse with the victim. The next morning, after a brief interrogation, he confessed to kidnaping and raping both women.

At the time of each incident Relford was in civilian clothes.

It is undisputed that these events all took place on the military reservation consisting of Fort Dix and the contiguous McGuire Air Force Base.

Relford, in due course, was charged with raping and kidnaping each of the women, in violation of Arts. 120 and 134, respectively, of the Uniform Code of Military Justice, 10 U. S. C. §§ 920 and 934.[9] He was tried by a general court-martial in December 1961 and was convicted on the four charges. Relford's sentence was the forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and death. The customary reference to the staff judge advocate was made and the convening authority approved. U. C. M. J. Arts. 60–65, 10 U. S. C. §§ 860–865. Upon the review by the Army Board of Review,[10] required under the Code's Art. 66, 10 U. S. C. § 866, the conviction was sustained; the sentence, however, was reduced to hard labor for 30 years, total forfeitures, and a dishonorable discharge. The Court of Military Appeals denied a petition for review on September 24, 1963. *United States* v. *Relford*, 14 U. S. C. M. A. 678.

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[9] Rape is specified in Art. 120 (a):

"§ 920. Art. 120. Rape and carnal knowledge.

"(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

Kidnaping is not specifically mentioned in the Code. The charge for that offense, therefore, was laid under Art. 134, the General Article:

"§ 934. Art. 134. General article.

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[10] Now the Court of Military Review. 82 Stat. 1341, 10 U. S. C. § 866 (1964 ed., Supp. V).

Relford's case thus became final more than five and a half years prior to this Court's decision in *O'Callahan* v. *Parker*.

In 1967, Relford, being in custody in the United States Disciplinary Barracks at Leavenworth, Kansas, filed his application for a writ of habeas corpus with the United States District Court for the District of Kansas. He alleged inadequate representation by counsel in the military proceeding. Chief Judge Stanley found no merit in the claim and denied the application. On appeal, Relford repeated the inadequate-representation claim and, for the first time, raised questions as to the admissibility of his confession, as to a lineup procedure, and as to the fairness of his military trial. The Tenth Circuit reviewed all these claims on the merits, but affirmed the District Court's denial of relief. *Relford* v. *Commandant*, 409 F. 2d 824 (1969).[11]

The Tenth Circuit's opinion was filed on April 23, 1969, several weeks prior to this Court's decision in *O'Callahan* v. *Parker*. The issue as to the propriety of trial by court-martial, perhaps understandably, was not raised before Judge Stanley or on the appeal to the Tenth Circuit; the issue, however, had been presented in O'Callahan's chronologically earlier appeal in his habeas proceeding. See *United States ex rel. O'Callahan* v. *Parker*, 390 F. 2d 360, 363–364 (CA3 1968).

II

This case, as did *O'Callahan*, obviously falls within the area of stress between the constitutional guarantees contained in the Constitution's Art. III, § 2, cl. 3, in the Sixth Amendment, and possibly in the Fifth Amendment, on the one hand, and, on the other, the power vested in

[11] We are advised by the parties that Relford was released on parole on May 20, 1970.

the Congress, by the Constitution's Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces," with its supportive Necessary and Proper provision in cl. 18, and the Fifth Amendment's correlative exception for "cases arising in the land or naval forces."

Relford argues that *O'Callahan*'s requirement that the crime be "service connected" before a court-martial may sit demands that the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action. He further states that the charges against him—like those against O'Callahan—do not involve a level of conduct required only of servicemen. He maintains that occurrence of the crimes on a military reservation and the military-dependent identity of one of his victims do not substantially support the military's claim of a special need to try him.

In further detail, it is stated that the Court in *O'Callahan* recognized that a court-martial "remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," 395 U. S., at 265; that military courts, of necessity, are not impartial weighers of justice, but have as their primary consideration the enforcement of the unique discipline required of a fighting force; and that, as a consequence, the court-martial must be limited to the "least possible power adequate to the end proposed." *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 23 (1955), citing *Anderson* v. *Dunn,* 6 Wheat. 204, 231 (1821).

It is then said that the level of conduct Relford is alleged to have violated, that is, intercourse only with consent, is the very same level required in the civilian community and is not altered by considerations of military dependency; that his alleged crimes are no more

military than were O'Callahan's; that the ability of the military to perform its mission remains the same whether the crimes with which he was charged were committed on base or off base; that any interest in the maintenance of order on the base is adequately served by apprehension of the offender and trial in a civilian court; that the on-post/off-post distinction has little meaning; that it is the nature of the crime that is important; that the crimes charged to Relford stand in contrast to purely military crimes such as desertion, absence without leave, missing movement, assaulting a superior commissioned officer, and being drunk on duty, U. C. M. J. Arts. 85, 86, 87, 90, and 112, 10 U. S. C. §§ 885, 886, 887, 890, and 912; and that only crimes of the latter type have "an immediate adverse impact upon the ability of the military to perform its mission," and are "proper subjects for the exercise of military jurisdiction."

III

In evaluating the force of this argument, the facts of *O'Callahan* and the precise holding in that case possess particular significance. We repeat: O'Callahan was in military service at the time and was stationed at a base in American territory. His offenses, however, took place off base in a civilian hotel while he was on leave and not in uniform.

MR. JUSTICE DOUGLAS, in speaking for the Court, said:

> "In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed

camp under military control, as are some of our far-flung outposts.

"Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." 395 U. S., at 273–274.

We stress seriatim what is thus emphasized in the holding:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.

IV

This listing of factors upon which the Court relied for its result in *O'Callahan* reveals, of course, that it chose

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to take an *ad hoc* approach to cases where trial by court-martial is challenged. We therefore turn to those factors in Relford's case that, as spelled out in O'Callahan's, bear upon the court-martial issue.

It is at once apparent that elements 4, 6, 8, 11, and 12, and perhaps 5 and 9, operate in Relford's favor as they did in O'Callahan's: The offenses were committed within the territorial limits of the United States; there was no connection between Relford's military duties and the crimes with which he was charged; courts in New Jersey were open and available for the prosecution of Relford; despite the Vietnam conflict we may assume for present purposes that the offenses were committed in peacetime and that they were unrelated to any problem of authority stemming from the war power; military authority, directly at least, was not flouted; the integrity of military property was not violated; and the crimes of rape and kidnaping are traditionally cognizable in the civilian courts.

Just as clearly, however, the other elements, present and relied upon in O'Callahan's case, are not at hand in Relford's case. These are elements 1, 2, 3, 7, and 10: Relford was not absent from the base; the crimes were committed on the military enclave; the second victim, because of her duties at the post exchange and because of the fact that her abduction and the attack upon her took place as she was returning to the PX at the end of a short and approved break in her work, was engaged in the performance of a duty relating to the military; and the security of two women properly on the post was threatened and, indeed, their persons were violated.

There are still other significant aspects of the Relford offenses: The first victim was the sister of a serviceman who was then properly at the base. The second victim was the wife of a serviceman stationed at the base; she and her husband had quarters on the base and were living

there. Tangible property properly on the base, that is, two automobiles, were forcefully and unlawfully entered.

V

With the foregoing contrasting comparison of the pertinent factual elements of *O'Callahan* with those of Relford's case, we readily conclude that the crimes with which Relford was charged were triable by a military court. We do not agree with petitioner when he claims that the "apparent distinctions" between this case and *O'Callahan* "evaporate when viewed within the context of the 'service-connected' test." [12] We stress: (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. Relford concedes the existence of this vital interest.[13] (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. See *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886 (1961). Relford also concedes this. (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission. (d) The conviction that Art. I, § 8, cl. 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and to punish. (e) The distinct possi-

[12] Petitioner's Brief 9.

[13] Petitioner's Reply Brief 2.

bility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community. See W. Winthrop, Military Law and Precedents 725 (2d ed. 1896, 1920 Reprint); Wilkinson, The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker, 9 Washburn L. J. 193, 208 (1970). (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance. (g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. The comment from Winthrop, *supra*, at 724:

> "Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower . . . inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses." (Footnotes omitted.)

cited both by the Court in *O'Callahan*, 395 U. S., at 274 n. 19, and by the dissent at 278–279, certainly so indicates and even goes so far as to include an offense against a civilian committed "near" a military post. (h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary

criminal law. (i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

This leads us to hold, and we do so hold, that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. Expressing it another way: a serviceman's crime against the person of an individual upon the base or against property on the base is "service connected," within the meaning of that requirement as specified in *O'Callahan,* 395 U. S., at 272. This delineation, we feel, fully comports with the standard of "the least possible power adequate to the end proposed" referred to in *O'Callahan,* 395 U. S., at 265.

By this measure, Relford's alleged offenses were obviously service connected. There is, therefore, no constitutional or statutory barrier and Relford was properly tried by a court-martial.

VI

We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.

VII

Having reached this result on the court-martial issue, the additional issue that the parties have argued, of *O'Callahan*'s retrospectivity, need not be decided. See *Alabama State Federation of Labor* v. *McAdory,* 325

U. S. 450, 461 (1945). We recognize that the retroactivity question has important dimensions, both direct and collateral, and that the Government strongly urges that the question be decided here and now. We have concluded, however, that the issue is better resolved in other litigation where, perhaps, it would be solely dispositive of the case. We take some comfort in the hope that the present decision should eliminate at least some of the confusion that the parties and commentators say has emerged from *O'Callahan*.[14]

Affirmed.

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[14] The Solicitor General supplied the following data relative to selected types of offenses over which the Army assumed jurisdiction in 1967:

Offense	*Number Occurring on Military Reservations*	*Number Occurring off Military Reservations*
1. Homicides	30	24
2. Sexual crimes (Rape, indecent assaults, etc.)	214	105
3. Robbery	112	44
4. Assaults	451	160
5. Burglary and Housebreaking	165	28
6. Arson	24	3
7. Larceny	1029	74
8. Larceny of motor vehicle	221	56
9. Narcotics offenses (including marihuana and dangerous drugs)	833	106
10. Disorderly conduct	59	22

Syllabus

BODDIE ET AL. *v.* CONNECTICUT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 27. Argued December 8, 1969—Reargued November 17, 1970—Decided March 2, 1971

In view of the basic position of the marriage relationship in our society and the state monopolization of the means for dissolving that relationship, due process of law prohibits a State from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Pp. 374–383.

286 F. Supp. 968, reversed.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 383. BRENNAN, J., filed an opinion concurring in part, *post*, p. 386. BLACK, J., filed a dissenting opinion, *post*, p. 389.

Arthur B. LaFrance reargued the cause and filed briefs for appellants.

Raymond J. Cannon, Assistant Attorney General of Connecticut, reargued the cause for appellees. With him on the brief were *Robert K. Killian*, Attorney General, and *William S. Kaplan*.

Allan Ashman filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Francis B. Burch*, Attorney General of Maryland, and *J. Michael McWilliams*, Assistant Attorney General, joined by *George F. Kugler, Jr.*, Attorney General of New Jersey, and *Stephen Skillman*, Assistant Attorney General, and by the following Attorneys General: *David P.*

Buckson of Delaware, *Jack P. F. Gremillion* of Louisiana, *Clarence A. H. Meyer* of Nebraska, *Harvey Dickerson* of Nevada, *Helgi Johanneson* of North Dakota, and *Lee Johnson* of Oregon.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellants, welfare recipients residing in the State of Connecticut, brought this action in the Federal District Court for the District of Connecticut on behalf of themselves and others similarly situated, challenging, as applied to them, certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict their access to the courts in their effort to bring an action for divorce.

It appears from the briefs and oral argument that the average cost to a litigant for bringing an action for divorce is $60. Section 52–259 of the Connecticut General Statutes provides: "There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars . . . ." An additional $15 is usually required for the service of process by the sheriff, although as much as $40 or $50 may be necessary where notice must be accomplished by publication.[1]

There is no dispute as to the inability of the named appellants in the present case to pay either the court fees required by statute or the cost incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance barely suffices

[1] App. 9. The dollar figures are averages taken from the undisputed allegations of the complaint. The particular fee the sheriff receives from the plaintiff for service of process in any one case depends on the distance he must travel to effectuate service of process. Conn. Gen. Stat. Rev. § 52–261 (1968).

to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. Also undisputed is appellants' "good faith" in seeking a divorce.

Assuming, as we must on this motion to dismiss the complaint, the truth of the *undisputed* allegations made by the appellants, it appears that they were unsuccessful in their attempt to bring their divorce actions in the Connecticut courts, simply by reason of their indigency. The clerk of the Superior Court returned their papers "on the ground that he could not accept them until an entry fee had been paid." App. 8–9. Subsequent efforts to obtain a judicial waiver of the fee requirement and to have the court effect service of process were to no avail. *Id.*, at 9.

Appellants thereafter commenced this action in the Federal District Court seeking a judgment declaring that Connecticut's statute and service of process provisions, "requiring payment of court fees and expenses as a condition precedent to obtaining court relief [are] unconstitutional [as] applied to these indigent [appellants] and all other members of the class which they represent." As further relief, appellants requested the entry of an injunction ordering the appropriate officials to permit them "to proceed with their divorce actions without payment of fees and costs." A three-judge court was convened pursuant to 28 U. S. C. § 2281, and on July 16, 1968, that court concluded that "a state [may] limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein." 286 F. Supp. 968, 972.

We noted probable jurisdiction, 395 U. S. 974 (1969). The case was heard at the 1969 Term and thereafter was

set for reargument at the present Term. 399 U. S. 922 (1970). We now reverse.[2] Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

I

At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

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[2] Following colloquy at the oral reargument as to the possible availability of public or private funds to enable plaintiffs-appellants to defray the expense requirements at issue in this case, the parties submitted further papers on this score. Nothing in these materials would justify our declining to adjudicate the constitutional question squarely presented by this record.

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Such litigation has, however, typically involved rights of defendants—not, as here, persons seeking access to the judicial process in the first instance. This is because our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where

some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.

Recognition of this theoretical framework illuminates the precise issue presented in this case. As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. See, *e. g., Loving* v. *Virginia,* 388 U. S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to

defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

II

These due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept, provide, we think, complete vindication for appellants' contentions. In particular, precedent has firmly embedded in our due process jurisprudence two important principles upon whose application we rest our decision in the case before us.

A

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend," *Windsor* v. *McVeigh*, 93 U. S. 274, 277 (1876). See *Baldwin* v. *Hale*, 1 Wall. 223 (1864); *Hovey* v. *Elliott*, 167 U. S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," *Hovey* v. *Elliott*, *supra*, at 417, has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*.[3] Although "[m]any controver-

[3] See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Armstrong* v. *Manzo*, 380 U. S. 545 (1965); *Schroeder* v. *New York*, 371 U. S. 208, 212 (1962); *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 338

sies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor, supra*, at 278, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 351 (1909). What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner,"*Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Tr. Co., supra*, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.[4] That the hearing required by due process

(1963); *Covey* v. *Town of Somers*, 351 U. S. 141 (1956); *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306 (1950); *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 246 (1944); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153 (1941); *Morgan* v. *United States*, 304 U. S. 1 (1938); *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463 (1934); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423 (1915); *Londoner* v. *Denver*, 210 U. S. 373, 385–386 (1908); *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236 (1900).

[4] Compare *Goldberg* v. *Kelly, supra*, with *In re Winship*, 397 U. S. 358 (1970). See also *Bowles* v. *Willingham*, 321 U. S. 503, 520–521 (1944).

is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,[5] except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.[6] In short, "within the limits of practicability," *id.*, at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

B

Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.[7]

No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws

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[5] *Goldberg* v. *Kelly, supra; Sniadach* v. *Family Finance Corp., supra; Opp Cotton Mills* v. *Administrator, supra,* at 152–153; *United States* v. *Illinois Central R. Co., supra,* at 463; *Coe* v. *Armour Fertilizer Works, supra.*

[6] *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886 (1961); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950); *Fahey* v. *Mallonee,* 332 U. S. 245 (1947); *Bowles* v. *Willingham, supra; Yakus* v. *United States,* 321 U. S. 414 (1944).

[7] *E. g., Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Bates* v. *Little Rock,* 361 U. S. 516, 527 (1960); *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

that operate to jeopardize it for particular individuals. See *Mullane* v. *Central Hanover Tr. Co., supra; Covey* v. *Town of Somers,* 351 U. S. 141 (1956).

In *Mullane* this Court held that the statutory provision for notice by publication in a local newspaper, although sufficient as to beneficiaries of a trust whose interests or addresses were unknown to the trustee, was not sufficient notice under the Due Process Clause for known beneficiaries. Similarly, *Covey* held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for a hearing, was not sufficient where the defendant was a known incompetent. The Court expressly rejected an argument that "the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer." *Id.,* at 146.

Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

III

Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient counter-

vailing justification for the State's action, a denial of due process.[8]

The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.

In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit,[9] but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous liti-

[8] At least one court has already recognized the special nature of the divorce action. Justice Sobel in a case like that before us took note of the State's involvement in the marital relationship:

"Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by 'due judicial proceedings. . . .' We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . . This hurdle is an effective barrier to [plaintiff's] access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained." *Jeffreys* v. *Jeffreys*, 58 Misc. 2d 1045, 1056, 296 N. Y. S. 2d 74, 87 (1968).

See also *Brown* v. *Chastain*, 416 F. 2d 1012, 1014 (CA5 1969) (Rives, J., dissenting).

[9] We think *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), has no bearing on this case. Differences between divorce actions and derivative actions aside, unlike *Cohen*, where we considered merely a statute on its face, the *application* of this statute here operates to cut off entirely access to the courts.

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gation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few. In the same vein we think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. See *Mullane* v. *Central Hanover Tr. Co., supra.* We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper.

We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois,* 351 U. S. 12 (1956). In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.

IV

In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any in-

dividual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Reversed.

MR. JUSTICE DOUGLAS, concurring in the result.

I believe this case should be decided upon the principles developed in the line of cases marked by *Griffin* v. *Illinois*, 351 U. S. 12. There we considered a state law which denied persons convicted of a crime full appellate review if they were unable to pay for a transcript of the trial. MR. JUSTICE BLACK's opinion announcing the judgment of the Court stated:

> "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19.

Griffin has had a sturdy growth. "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts* v. *LaVallee*, 389 U. S. 40, 42. See also *Williams* v. *Oklahoma City*, 395 U. S. 458; *Long* v. *District Court of Iowa*, 385 U. S. 192; *Draper* v. *Washington*, 372 U. S. 487. But

Griffin has not been limited to securing a record for indigents who appeal their convictions. If the more affluent have counsel on appeal, then counsel for indigents must be provided on appeal of a criminal conviction. *Douglas* v. *California*, 372 U. S. 353. The tie to *Griffin* was explicit. "In either case [*Griffin* or *Douglas*] the evil is the same: discrimination against the indigent." *Id.*, at 355.

In *Burns* v. *Ohio*, 360 U. S. 252, we invalidated a procedure whereby cases within the jurisdiction of the state supreme court would not be considered if a person could not pay the filing fee. In *Smith* v. *Bennett*, 365 U. S. 708, we held that requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalid under the Equal Protection Clause. Here Connecticut has provided requirements for married couples to obtain divorces and because of filing fees and service of process one of the requirements is having the necessary money. The more affluent can obtain a divorce; the indigent cannot. This situation is comparable to *Burns* v. *Ohio*, and *Smith* v. *Bennett*.

The Due Process Clause on which the Court relies has proven very elastic in the hands of judges. "The doctrine that prevailed in *Lochner* [v. *New York*, 198 U. S. 45], *Coppage* [v. *Kansas*, 236 U. S. 1], *Adkins* [v. *Children's Hospital*, 261 U. S. 525], [*Jay*] *Burns* [*Baking Co.* v. *Bryan*, 264 U. S. 504], and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730. I would not invite its revival.

Whatever residual element of substantive law the Due Process Clause may still have (*Thompson* v. *Louisville*, 362 U. S. 199), it essentially regulates procedure. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337; *Wisconsin* v. *Constantineau*, 400 U. S. 433. The Court today puts

"flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? The affluent can put up the bond, though the indigent may not be able to do so. See *Williams* v. *Shaffer*, 385 U. S. 1037. Is housing less important to the mucilage holding society together than marriage? The examples could be multiplied. I do not see the length of the road we must follow if we accept my Brother HARLAN's invitation. The question historically has been whether the right claimed is "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325. That makes the test highly subjective and dependent on the idiosyncrasies of individual judges as *Lochner*, *Coppage*, and *Adkins* illustrate.

The reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some,* as it has been construed, rather definite guidelines have been developed: *race* is one (*Strauder* v. *West Virginia*, 100 U. S. 303; *McLaughlin* v. *Florida*, 379 U. S. 184); *alienage* is another (*Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410); *religion* is another (*Sherbert* v. *Verner*, 374 U. S. 398); *poverty* is still another (*Griffin* v. *Illinois*, *supra*); and *class* or *caste* yet another (*Skinner* v. *Oklahoma*, 316 U. S. 535).

The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions. But could a State deny divorces to domiciliaries who were Negroes and grant them to whites?

*See Karst, Invidious Discrimination, 16 U. C. L. A. L. Rev. 716 (1969).

Deny them to resident aliens and grant them to citizens? Deny them to Catholics and grant them to Protestants? Deny them to those convicted of larceny and grant them to those convicted of embezzlement?

Here the invidious discrimination is based on one of the guidelines: *poverty.*

An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce. Connecticut says in its brief that this is justified because "the State does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together."

Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth. Just as denying further judicial review in *Burns* and *Smith,* appellate counsel in *Douglas,* and a transcript in *Griffin* created an invidious distinction based on wealth, so, too, does making the grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.

MR. JUSTICE BRENNAN, concurring in part.

I join the Court's opinion to the extent that it holds that Connecticut denies procedural due process in denying the indigent appellants access to its courts for the sole reason that they cannot pay a required fee. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with

a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970). When a State's interest in imposing a fee requirement on an indigent is compared to the indigent's interest in being heard, it is clear that the latter is the weightier. It is an unjustifiable denial of a hearing, and therefore a denial of due process, to close the courts to an indigent on the ground of nonpayment of a fee.

But I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually "the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Ante*, at 376–377. In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants "an opportunity to be heard upon their claimed right to a dissolution of their marriages" without a sufficient countervailing justification. *Ante*, at 380. I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends

to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis.

In addition, this case presents a classic problem of equal protection of the laws. The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause.

In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), we held under the Equal Protection Clause as well as the Due Process Clause that a State may not deny a free transcript to an indigent, where the transcript is necessary for a direct appeal from his conviction. Subsequently, we have applied and extended that principle in numerous criminal cases. See, *e. g.*, *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U. S. 214 (1958); *Burns* v. *Ohio*, 360 U. S. 252 (1959); *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Coppedge* v. *United States*, 369 U. S. 438 (1962); *Lane* v. *Brown*, 372 U. S. 477 (1963); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Gardner* v. *California*, 393 U. S. 367 (1969). The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent

plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," *Griffin* v. *Illinois, supra,* at 19, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. Cf. *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966). In my view, Connecticut's fee requirement, as applied to an indigent, is a denial of equal protection.

MR. JUSTICE BLACK, dissenting.

This is a strange case and a strange holding. Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce. When the first settlers arrived here the power to grant divorces in Great Britain was not vested in that country's courts but in its Parliament. And as recently as 1888 this Court in *Maynard* v. *Hill,* 125 U. S. 190, upheld a divorce granted by the Legislature of the Territory of Oregon. Since that time the power of state legislatures to grant divorces or vest that power in their courts seems not to have been questioned. It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages. The power of the States over marriage and

divorce is complete except as limited by specific constitutional provisions. *Loving* v. *Virginia*, 388 U. S. 1, 7–12 (1967).

The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs when they are without ready money to put up those costs. The Court holds that the state law requiring payment of costs is barred by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. Two members of the majority believe that the Equal Protection Clause also applies. I think the Connecticut court costs law is barred by neither of those clauses.

It is true, as the majority points out, that the Court did hold in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), that indigent defendants in criminal cases must be afforded the same right to appeal their convictions as is afforded to a defendant who has ample funds to pay his own costs. But in *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.

Criminal defendants are brought into court by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States Constitution has provided special protections for people charged with crime. They cannot be convicted under bills of attainder or ex post facto laws. And numerous provisions of the Bill of Rights—the right to counsel, the right to be free from coerced

confessions, and other rights—shield defendants in state courts as well as federal courts. See, *e. g., Benton* v. *Maryland,* 395 U. S. 784 (1969); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in *Griffin* that the Due Process and Equal Protection Clauses both barred any discrimination in criminal trials against poor defendants who are unable to defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime.

Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

This distinction between civil and criminal proceedings is implicit in *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541 (1949), where we held that a statute requiring some, but not all, plaintiffs in stockholder derivative actions to post a bond did not violate the Due Process or the Equal Protection Clause. The *Cohen* case is indistin-

guishable from the one before us. In *Cohen*, as here, the statute applied to plaintiffs. In both situations the legal relationships involved are creatures of the State, extensively governed by state law. The effect of both statutes may be to deter frivolous or ill-considered suits, and in both instances the State has a considerable interest in the prevention of such suits, which might harm the very relationship the State created and fostered. Finally, the effect of both statutes may be to close the state courts entirely to certain plaintiffs, a result the Court explicitly accepted in *Cohen*. See *id.*, at 552. I believe the present case should be controlled by the Court's thorough opinion in *Cohen*.

The Court's suggested distinction of *Cohen* on the ground that the Court there dealt only with the validity of the statute on its face ignores the following pertinent language:

> "It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, *it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.*" *Id.*, at 552. (Emphasis added.)

Rather, *Cohen* can only be distinguished on the ground that it involved a stockholders' suit, while this case involves marriage, an interest "of basic importance in our society." Thus the Court's opinion appears to rest solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet

other tests composed of similar words or phrases equally lacking in any possible constitutional precision. These concepts, of course, mark no constitutional boundaries and cannot possibly depend upon anything but the belief of particular judges, at particular times, concerning particular interests which those judges have divined to be of "basic importance."

I do not believe the wise men who sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and the king's judges, would have used any such words or phrases. Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics. I believe the only way to steer this country towards its great destiny is to follow what our Constitution says, not what judges think it should have said.

For these reasons I am constrained to repeat what I said in dissent in *Williams* v. *North Carolina*, 325 U. S. 226, 271–274 (1945):

> "I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of

> state and federal power to see that they comport with our ideas of what are 'civilized standards of law.' . . .
>
> . . . . .
>
> ". . . This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance with their ideas of civilization's demands. I should leave the power over divorces in the states."

See also *In re Winship*, 397 U. S. 358, 377 (1970) (BLACK, J., dissenting).

One more thought about the Due Process and Equal Protection Clauses: neither, in my judgment, justifies judges in trying to make our Constitution fit the times, or hold laws constitutional or not on the basis of a judge's sense of fairness. The Equal Protection Clause is no more appropriate a vehicle for the "shock the conscience" test than is the Due Process Clause. See, *e. g.*, my dissent in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 675–680 (1966). The rules set out in the Constitution itself provide what is governmentally fair and what is not. Neither due process nor equal protection permits state laws to be invalidated on any such nonconstitutional standard as a judge's personal view of fairness. The people and their elected representatives, not judges, are constitutionally vested with the power to amend the Constitution. Judges should not usurp that power in order to put over their own views. Accordingly, I would affirm this case.

TATE *v.* SHORT

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 324. Argued January 14, 1971—Decided March 2, 1971

Petitioner, an indigent, was convicted of traffic offenses and fined a total of $425. Though Texas law provides only for fines for such offenses, it requires that persons unable to pay must be incarcerated for sufficient time to satisfy their fines, at the rate of $5 per day, which in petitioner's case meant an 85-day term. The state courts denied his petition for habeas corpus. *Held:* It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it. *Williams* v. *Illinois*, 399 U. S. 235. Pp. 397–401.

445 S. W. 2d 210, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring statement, *post*, p. 401. BLACK, J., concurred in the result. HARLAN, J., filed a statement concurring in the judgment, *post*, p. 401.

Norman Dorsen argued the cause for petitioner. With him on the briefs were *Peter Sanchez-Navarro, Jr.*, and *Stanley A. Bass.*

Joseph G. Rollins argued the cause for respondent. With him on the brief were *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Alfred Walker*, Executive Assistant Attorney General, and *Robert C. Flowers* and *Gilbert J. Pena*, Assistant Attorneys General.

Allan Ashman filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner accumulated fines of $425 on nine convictions in the Corporation Court of Houston, Texas, for traffic offenses. He was unable to pay the fines because of indigency [1] and the Corporation Court, which otherwise has no jurisdiction to impose prison sentences,[2] committed him to the municipal prison farm according to the provisions of a state statute and municipal ordinance [3] which required that he remain there a suffi-

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[1] At the habeas corpus hearing the assistant district attorney appearing for the State stipulated: "We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be." Petitioner's uncontradicted testimony at the hearing was that, prior to his imprisonment, he earned between $25 and $60 a week in casual employment. He also received a monthly Veterans Administration check of $104. He has a wife and two children dependent on him for support. We were advised on oral argument that under Texas law his automobile was not subject to execution to collect the fines.

[2] Tex. Code Crim. Proc., Art. 4.14 (1966) provides:

"The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

[3] Tex. Code Crim. Proc., Art. 45.53 (1966), provides in pertinent part:

"A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

"1. That he is too poor to pay the fine and costs; and

"2. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of $5 for each day."

Houston Code § 35–8 provides:

"Each person committed to the county jail or to the municipal

cient time to satisfy the fines at the rate of five dollars for each day; this required that he serve 85 days at the prison farm. After 21 days in custody, petitioner was released on bond when he applied to the County Criminal Court of Harris County for a writ of habeas corpus. He alleged that: "Because I am too poor, I am, therefore, unable to pay the accumulated fine of $425." The county court held that "legal cause has been shown for the imprisonment," and denied the application. The Court of Criminal Appeals of Texas affirmed, stating: "We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional." 445 S. W. 2d 210 (1969). We granted certiorari, 399 U. S. 925 (1970). We reverse on the authority of our decision in *Williams* v. *Illinois*, 399 U. S. 235 (1970).

The Illinois statute involved in *Williams* authorized both a fine and imprisonment. Williams was given the maximum sentence for petty theft of one year's imprisonment and a $500 fine, plus $5 in court costs. The judgment, as permitted by the Illinois statute, provided that if, when the one-year sentence expired, Williams did not pay the fine and court costs, he was to remain in jail a sufficient length of time to satisfy the total amount at the rate of $5 per day. We held that the Illinois statute as applied to Williams worked an invidious discrimination solely because he was too poor to pay the fine, and therefore violated the Equal Protection Clause.

Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpay-

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prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served."

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ment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.[4] In *Morris* v. *Schoonfield*, 399 U. S. 508, 509 (1970), four members of the Court anticipated the problem of this case and stated the view, which we now adopt, that

> "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

Our opinion in *Williams* stated the premise of this conclusion in saying that "the Equal Protection Clause of the Fourteenth Amendment requires that the statu-

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[4] Houston Code § 35–9 provides:

"[A]dditional credit against the fine of each prisoner may be granted by the superintendent of the municipal prison farm for good conduct, industry and obedience; provided, however, that such additional credit shall not exceed in time more than one-half (½) day credit on his fine for each day's work."

An implementing regulation of the Fines Bureau Division of the Houston Corporation Court interprets this provision as follows:

"If a person appears in court and is found guilty and does not have money to pay his fine, he is committed to jail to serve the amount of the fine at the rate of $5.00 per day. In certain cases a person may be allowed $7.50 credit per day."

It does not appear that petitioner was granted the increased credit for any of the 21 days he served before his release.

tory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U. S., at 244. Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines. We repeat our observation in *Williams* in that regard, 399 U. S., at 244–245 (footnotes omitted):

> "The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.
>
> "It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are

> already utilized in some States, while others resemble those proposed by various studies. The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." [5]

We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood

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[5] Several States have a procedure for paying fines in installments. *E. g.*, Cal. Penal Code § 1205 (1970) (misdemeanors); Del. Code Ann., Tit. 11, § 4332 (c) (Supp. 1968); Md. Ann. Code, Art. 38, § 4 (a) (2) (Supp. 1970); Mass. Gen. Laws Ann., c. 279, § 1A (1959); N. Y. Code Crim. Proc. § 470–d (1) (b) (Supp. 1970); Pa. Stat. Ann., Tit. 19, § 953 (1964); Wash. Rev. Code § 9.92.070.

This procedure has been widely endorsed as effective not only to collect the fine but also to save the expense of maintaining a prisoner and avoid the necessity of supporting his family under the state welfare program while he is confined. See, *e. g.*, Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 3302 (2) (1971); American Bar Association, Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7 (b), pp. 119–122 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); ALI, Model Penal Code § 302.1 (1) (Proposed Official Draft 1962). See also Comment, Equal Protection and the Use of Fines as Penalties for Criminal Offenses, 1966 U. Ill. L. F. 460; Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich. L. Rev. 938 (1966); Note, Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution, 22 Vand. L. Rev. 611 (1969); Note, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013 (1953); J. Sellin, Recent Penal Legislation in Sweden 14 (1947); Cordes, Fines and Their Enforcement, 2 J. Crim. Sci. 46 (1950); S. Rubin, H. Weihofen, G. Edwards, & S. Rosenzweig, The Law of Criminal Correction 253 and n. 154 (1963); E. Sutherland & D. Cressey, Principles of Criminology 276 (6th ed. 1960). See also *Williams* v. *Illinois*, 399 U. S., at 244–245, n. 21.

as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

The judgment of the Court of Criminal Appeals of Texas is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the basis of the considerations set forth in his opinion concurring in the result in *Williams* v. *Illinois*, 399 U. S. 235, 259 (1970).

MR. JUSTICE BLACKMUN, concurring.

The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable.

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 1066. Argued January 11, 1971—Decided March 2, 1971

Under § 4 (f) of the Department of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968, the Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, he may approve construction only if there has been "all possible planning to minimize harm" to the park. Petitioners contend that the Secretary has violated these statutes by authorizing a six-lane interstate highway through a Memphis public park. In April 1968 the Secretary announced that he agreed with the local officials that the highway go through the park; in September 1969 the State acquired the right-of-way inside the park; and in November 1969 the Secretary announced final approval, including the design, of the road. Neither announcement of the Secretary was accompanied by factual findings. Respondents introduced affidavits in the District Court, indicating that the Secretary had made the decision and that it was supportable. Petitioners filed counter affidavits and sought to take the deposition of a former federal highway administrator. The District Court and the Court of Appeals found that formal findings were not required and refused to order the deposition of the former administrator. Both courts held that the affidavits afforded no basis for determining that the Secretary exceeded his authority. *Held:*

1. The Secretary's action is subject to judicial review pursuant to § 701 of the Administrative Procedure Act. Pp. 409–413.

(a) There is no indication here that Congress sought to limit or prohibit judicial review. P. 410.

(b) The exemption for action "committed to agency discretion" does not apply as the Secretary does have "law to apply," rather than wide-ranging discretion. Pp. 410–413.

2. Although under § 706 of the Act *de novo* review is not required here and the Secretary's approval of the route need not

meet the substantial-evidence test, the reviewing court must conduct a substantial inquiry and determine whether the Secretary acted within the scope of his authority, whether his decision was within the small range of available choices, and whether he could have reasonably believed that there were no feasible alternatives. The court must find that the actual choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and that the Secretary followed the necessary procedural requirements. Pp. 413–416.

3. Formal findings by the Secretary are not required in this case. Pp. 417–419.

(a) The relevant statutes do not require formal findings, and there is no ambiguity in the Secretary's action. P. 417.

(b) Although a regulation requiring formal findings was issued after the Secretary had approved the route, a remand to him is not necessary as there is an administrative record facilitating full and prompt review of the Secretary's action. Pp. 417–419.

4. The case is remanded to the District Court for plenary review of the Secretary's decision. Pp. 419–420.

(a) The lower courts' review was based on litigation affidavits, which are not the whole record and are an inadequate basis for review. P. 419.

(b) In view of the lack of formal findings, the court may require the administrative officials who participated in the decision to give testimony explaining their action or require the Secretary to make formal findings. P. 420.

432 F. 2d 1307, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., filed a separate opinion, in which BRENNAN, J., joined, *post*, p. 421. BLACKMUN, J., filed a separate statement, *post*, p. 422. DOUGLAS, J., took no part in the consideration or decision of this case.

John W. Vardaman, Jr., argued the cause for petitioners. With him on the briefs was *Edward Bennett Williams*.

Solicitor General Griswold argued the cause for respondent Volpe. With him on the brief were *Assistant*

Attorney General Gray, Alan S. Rosenthal, and *Daniel Joseph. J. Alan Hanover* argued the cause for respondent Speight. With him on the brief were *David M. Pack,* Attorney General of Tennessee, *Lurton C. Goodpasture,* Assistant Attorney General, and *James B. Jalenak.*

Briefs of *amici curiae* were filed by *James M. Manire* and *Jack Petree* for the city of Memphis et al., and by *Roberts B. Owen* and *Gerald P. Norton* for the Committee of 100 on the Federal City, Inc., et al.

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE STEWART.

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation [1] designed to curb the accelerating destruction of our country's natural beauty. We are concerned in this case with § 4 (f) of the Department of Transportation Act of 1966, as amended,[2] and § 18 (a) of

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[1] See, *e. g.,* The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.* (1964 ed., Supp. V); Environmental Education Act, 84 Stat. 1312, 20 U. S. C. § 1531 *et seq.* (1970 ed.); Air Quality Act of 1967, 81 Stat. 485, 42 U. S. C. § 1857 *et seq.* (1964 ed., Supp. V); Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U. S. C. §§ 4371–4374 (1970 ed.).

[2] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or

the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U. S. C. § 138 (1964 ed., Supp. V) (hereafter § 138).[3] These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" [4] alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been "all possible planning to minimize harm" [5] to the park.

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local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 82 Stat. 824, 49 U. S. C. § 1653 (f) (1964 ed., Supp. V).

[3] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U. S. C. § 138 (1964 ed., Supp. V).

[4] 49 U. S. C. § 1653 (f) (1964 ed., Supp. V); 23 U. S. C. § 138 (1964 ed., Supp. V).

[5] *Ibid.*

Petitioners, private citizens as well as local and national conservation organizations, contend that the Secretary has violated these statutes by authorizing the expenditure of federal funds[6] for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. Their claim was rejected by the District Court,[7] which granted the Secretary's motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed.[8] After oral argument, this Court granted a stay that halted construction and, treating the application for the stay as a petition for certiorari, granted review.[9] 400 U. S. 939. We now reverse the judgment below and remand for further proceedings in the District Court.

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway,[10] will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed. The highway is to be a segment of Interstate Highway I–40, part of the National System of Interstate and

[6] See 23 U. S. C. § 103.

[7] The case originated in the United States District Court for the District of Columbia. On application of the Secretary of Transportation it was transferred to the United States District Court for the Western District of Tennessee, which entered the summary judgment.

[8] 432 F. 2d 1307 (CA6 1970).

[9] This Court ordered the case to be heard on an expedited schedule.

[10] The proposed right-of-way will be 250 to 450 feet wide and will follow the route of a presently existing, nonaccess bus route, which carries occasional bus traffic along a 40- to 50-foot right-of-way.

Defense Highways.[11] I–40 will provide Memphis with a major east-west expressway which will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.[12]

Although the route through the park was approved by the Bureau of Public Roads in 1956 [13] and by the Federal Highway Administrator in 1966, the enactment of § 4 (f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4 (f) had been met. Federal funding for the rest of the project was, however, available; and the state acquired a right-of-way on both sides of the park.[14] In April 1968, the Secretary announced that he concurred in the judgment of local officials that I–40 should be built through the park. And in September 1969 the State acquired the right-of-way inside Overton Park from the city.[15] Final approval for the project—the route as well as the design—was not announced until November 1969, after Congress had reiterated in § 138 of the Federal-Aid Highway Act

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[11] See 23 U. S. C. § 103 (d) (1964 ed., Supp. V).

[12] I–40 will also provide an express bypass for east-west traffic through Memphis.

[13] At that time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act, 49 U. S. C. § 1651 *et seq.* (1964 ed., Supp. V), which became effective on April 1, 1967, transferred the Bureau to the new Department of Transportation.

[14] The Secretary approved these acquisitions in 1967 shortly after the effective date of § 4 (f).

[15] The State paid the City $2,000,000 for the 26-acre right-of-way and $206,000 to the Memphis Park Commission to replace park facilities that were to be destroyed by the highway. The city of Memphis has used $1,000,000 of these funds to pay for a new 160-acre park and it is anticipated that additional parkland will be acquired with the remaining money.

that highway construction through public parks was to be restricted. Neither announcement approving the route and design of I–40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Petitioners contend that the Secretary's action is invalid without such formal findings [16] and that the Secretary did not make an independent determination but merely relied on the judgment of the Memphis City Council.[17] They also contend that it would be "feasible and prudent" to route I–40 around Overton Park either to the north or to the south. And they argue that if these alternative routes are not "feasible and prudent," the present plan does not include "all possible" methods for reducing harm to the park. Petitioners claim that I–40 could be built under the park by using either of two possible tunneling methods,[18] and they claim that, at a

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[16] Respondents argue that the only issue raised by petitioners' pleadings is the failure of the Secretary to make formal findings. But when petitioners' complaint is read in the revealing light of *Conley* v. *Gibson*, 355 U. S. 41 (1957), it is clear that petitioners have also challenged the merits of the Secretary's decision.

[17] Petitioners contend that former Federal Highway Administrator Bridwell's account of an April 3, 1968, meeting with the Memphis City Council given to the Senate Subcommittee on Roads of the Senate Committee on Public Works supports this charge. See Hearings on Urban Highway Planning, Location, and Design before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong., 1st and 2d Sess., pt. 2, pp. 478–480 (1968).

[18] Petitioners argue that either a bored tunnel or a cut-and-cover tunnel, which is a fully depressed route covered after construction, could be built. Respondents contend that the construction of a tunnel by either method would greatly increase the cost of the project, would create safety hazards, and because of increases in air pollution would not reduce harm to the park.

minimum, by using advanced drainage techniques [19] the expressway could be depressed below ground level along the entire route through the park including the section that crosses the small creek.

Respondents argue that it was unnecessary for the Secretary to make formal findings, and that he did, in fact, exercise his own independent judgment which was supported by the facts. In the District Court, respondents introduced affidavits, prepared specifically for this litigation, which indicated that the Secretary had made the decision and that the decision was supportable. These affidavits were contradicted by affidavits introduced by petitioners, who also sought to take the deposition of a former Federal Highway Administrator [20] who had participated in the decision to route I–40 through Overton Park.

The District Court and the Court of Appeals found that formal findings by the Secretary were not necessary and refused to order the deposition of the former Federal Highway Administrator because those courts believed that probing of the mental processes of an administrative decisionmaker was prohibited. And, believing that the Secretary's authority was wide and reviewing courts' authority narrow in the approval of highway routes, the lower courts held that the affidavits contained no basis for a determination that the Secretary had exceeded his authority.

We agree that formal findings were not required. But we do not believe that in this case judicial review based solely on litigation affidavits was adequate.

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[19] Petitioners contend that adequate drainage could be provided by using mechanical pumps or some form of inverted siphon. They claim that such devices are often used in expressway construction.

[20] Petitioners wanted to question former Highway Administrator Bridwell. See n. 17, *supra*.

A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. V), provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation,[21] is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). *Brownell* v. *We Shung*, 352 U. S. 180, 185 (1956).[22]

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception.[23] Berger, Administrative Arbitrariness and Judicial Review, 65 Col. L. Rev. 55 (1965). The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

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[21] In addition, the Department of Transportation Act makes the Administrative Procedure Act applicable to proceedings of the Department of Transportation. 49 U. S. C. § 1655 (h) (1964 ed., Supp. V).

[22] See also *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962).

[23] The scope of this exception has been the subject of extensive commentary. See, *e. g.*, Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965 (1969); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968); Davis, Administrative Arbitrariness is Not Always Reviewable, 51 Minn. L. Rev. 643 (1967); Berger, Administrative Arbitrariness: A Sequel, 51 Minn. L. Rev. 601 (1967).

Section 4 (f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and specific directives. Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary "shall not approve any program or project" that requires the use of any public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.[24] Respondents argue, however, that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent."

But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction

[24] See 114 Cong. Rec. 19915 (statement by Rep. Holifield).

whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another,[25] there will always be a smaller outlay required from the public purse [26] when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Congress clearly did not intend that cost and disruption of the community were to be ignored [27] by the Secretary.[28] But the very existence of the statutes [29] indicates that protection of parkland was to be given para-

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[25] See n. 15, *supra*.

[26] See 114 Cong. Rec. 24037 (statement by Sen. Yarborough).

[27] See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 18–19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12.

[28] The legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision. 114 Cong. Rec. 24036–24037.

[29] The legislative history of both § 4 (f) of the Department of Transportation Act, 49 U. S. C. § 1653 (f) (1964 ed., Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U. S. C. § 138 (1964 ed., Supp. V), is ambiguous. The legislative committee reports tend to support respondents' view that the statutes are merely general directives to the Secretary requiring him to consider the importance of parkland as well as cost, community disruption, and other factors. See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12. Statements by proponents of the statutes as well as the Senate committee report on § 4 (f) indicate, however, that the Secretary was to have limited authority. See, *e. g.*, 114 Cong. Rec. 24033–24037; S. Rep. No. 1659, 89th Cong., 2d Sess., 22. See also H. R. Conf. Rep. No. 2236, 89th Cong., 2d Sess., 25. Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.

mount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Plainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. But the existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, 5 U. S. C. § 706 (1964 ed., Supp. V), which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards.[30] In all cases

[30] "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the

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agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U. S. C. §§ 706 (2)(A), (B), (C), (D) (1964 ed., Supp. V). In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by "substantial evidence." And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it was "unwarranted by the facts." 5 U. S. C. §§ 706 (2)(E), (F) (1964 ed., Supp. V).

Petitioners argue that the Secretary's approval of the construction of I–40 through Overton Park is subject to one or the other of these latter two standards of limited applicability. First, they contend that the "substantial evidence" standard of § 706 (2)(E) must be applied. In the alternative, they claim that § 706 (2)(F) applies and that there must be a *de novo* review to determine if the Secretary's action was "unwarranted by the facts." Neither of these standards is, however, applicable.

Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U. S. C. § 553 (1964 ed., Supp. V), or when the agency action is based on a public adjudicatory hearing. See 5 U. S. C. §§ 556, 557 (1964 ed., Supp. V). The Secretary's decision to allow the expenditure of federal funds to build I–40 through Overton Park was plainly not an exercise of a rulemaking function. See 1 K. Davis, Administrative Law Treatise § 5.01 (1958). And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the dis-

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whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U. S. C. § 706 (1964 ed., Supp. V).

tribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. 23 U. S. C. § 128 (1964 ed., Supp. V). The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review. See H. R. Rep. No. 1980, 79th Cong., 2d Sess.

Petitioners' alternative argument also fails. *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H. R. Rep. No. 1980, 79th Cong., 2d Sess. Neither situation exists here.

Even though there is no *de novo* review in this case and the Secretary's approval of the route of I–40 does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. See, *e. g., Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185 (1935); *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15 (1926). But that presumption is not to shield his action from a thorough, probing, in-depth review.

The court is first required to decide whether the Secretary acted within the scope of his authority. *Schilling* v. *Rogers,* 363 U. S. 666, 676–677 (1960). This determination naturally begins with a delineation of the scope of

the Secretary's authority and discretion. L. Jaffe, Judicial Control of Administrative Action 359 (1965). As has been shown, Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jaffe, *supra*, at 182. See *McBee* v. *Bomar*, 296 F. 2d 235, 237 (CA6 1961); *In re Josephson*, 218 F. 2d 174, 182 (CA1 1954); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (ND Cal. 1968). See also *Wong Wing Hang* v. *Immigration and Naturalization Serv.*, 360 F. 2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Here the only procedural error alleged is the failure of the Secretary to make formal findings and state his reason for allowing the highway to be built through the park.

Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act requires such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U. S. C. §§ 553 (a)(2), 554 (a) (1964 ed., Supp. V). And, although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See *City of Yonkers* v. *United States*, 320 U. S. 685 (1944); *American Trucking Assns.* v. *United States*, 344 U. S. 298, 320 (1953). Plainly, there is no ambiguity here; the Secretary has approved the construction of I–40 through Overton Park and has approved a specific design for the project.

Petitioners contend that although there may not be a statutory requirement that the Secretary make formal findings and even though this may not be a case for the reviewing court to impose a requirement that findings be made, Department of Transportation regulations require them. This argument is based on DOT Order 5610.1,[31] which requires the Secretary to make formal

[31] The regulation was promulgated pursuant to Executive Order 11514, dated March 5, 1970, 35 Fed. Reg. 4247, which instructed all federal agencies to initiate procedures needed to direct their policies and programs toward meeting national environmental goals.

findings when he approves the use of parkland for highway construction but which was issued after the route for I–40 was approved.[32] Petitioners argue that even though the order was not in effect at the time approval was given to the Overton Park project and even though the order was not intended to have retrospective effect the order represents the law at the time of this Court's decision and under *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281–282 (1969), should be applied to this case.

The *Thorpe* litigation resulted from an attempt to evict a tenant from a federally funded housing project under circumstances that suggested that the eviction was prompted by the tenant's objections to the management of the project. Despite repeated requests, the Housing Authority would not give an explanation for its action. The tenant claimed that the eviction interfered with her exercise of First Amendment rights and that the failure to state the reasons for the eviction and to afford her a hearing denied her due process. After denial of relief in the state courts, this Court granted certiorari "to consider whether [the tenant] was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons." 393 U. S., at 272.

While the case was pending in this Court, the Department of Housing and Urban Development issued regulations requiring Housing Authority officials to inform tenants of the reasons for an eviction and to give a tenant the opportunity to reply. The case was then remanded to the state courts to determine if the HUD regulations were applicable to that case. The state court held them not to be applicable and this Court reversed on the

[32] DOT Order 5610.1 was issued on October 7, 1970.

ground that the general rule is "that an appellate court must apply the law in effect at the time it renders its decision." 393 U. S., at 281.

While we do not question that DOT Order 5610.1 constitutes the law in effect at the time of our decision, we do not believe that *Thorpe* compels us to remand for the Secretary to make formal findings.[33] Here, unlike the situation in *Thorpe,* there has been a change in circumstances—additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. Moreover, there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.

That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely *"post hoc"* rationalizations, *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168–169 (1962), which have traditionally been found to be an inadequate basis for review. *Burlington Truck Lines* v. *United States, supra; SEC* v. *Chenery Corp.,* 318 U. S. 80, 87 (1943). And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. See n. 30, *supra.*

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[33] Even if formal findings by the Secretary were mandatory, the proper course would be to remand the case to the District Court directing that court to order the Secretary to make formal findings. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 446, p. 929 (R. Wolfson & P. Kurland ed. 1951). Of course, the District Court is not prohibited from remanding the case to the Secretary. See *infra,* at 420.

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.[34] But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States* v. *Morgan*, 313 U. S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See *Shaughnessy* v. *Accardi*, 349 U. S. 280 (1955).

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "*post hoc* rationalization" and thus must be viewed critically. If the District Court decides

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[34] The Solicitor General now urges that in order to avoid additional delay the proper course is to remand the case to the District Court for review of the full administrative record.

that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. The Act of Congress in connection with other federal highway aid legislation,[1] it seems to me,

[1] See 23 U. S. C. § 128 (1964 ed., Supp. V) and regulations promulgated thereunder, 34 Fed. Reg. 727–730 (1969).

calls for hearings—hearings that a court can review, hearings that demonstrate more than mere arbitrary defiance by the Secretary. Whether the findings growing out of such hearings are labeled "formal" or "informal" appears to me to be no more than an exercise in semantics. Whatever the hearing requirements might be, the Department of Transportation failed to meet them in this case. I regret that I am compelled to conclude for myself that, except for some too-late formulations, apparently coming from the Solicitor General's office, this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress. It is our duty, I believe, to remand this whole matter back to the Secretary of Transportation for him to give this matter the hearing it deserves in full good-faith obedience to the Act of Congress. That Act was obviously passed to protect our public parks from forays by road builders except in the most extraordinary and imperative circumstances.[2] This record does not demonstrate the existence of such circumstances. I dissent from the Court's failure to send the case back to the Secretary, whose duty has not yet been performed.

MR. JUSTICE BLACKMUN.

I fully join the Court in its opinion and in its judgment. I merely wish to state the obvious: (1) The case comes to this Court as the end product of more than a decade of endeavor to solve the interstate highway problem at Memphis. (2) The administrative decisions under attack here are not those of a single Secretary; some were made by the present Secretary's predecessor and, before him, by the Department of Commerce's Bureau of Public

[2] See also *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 400 U. S. 968, 972 (1970) (dissents from the denial of certiorari).

Roads. (3) The 1966 Act and the 1968 Act have cut across former methods and here have imposed new standards and conditions upon a situation that already was largely developed.

This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after the passage of the 1966 Act.

GRIGGS ET AL. *v.* DUKE POWER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 124. Argued December 14, 1970—Decided March 8, 1971

Negro employees at respondent's generating plant brought this action, pursuant to Title VII of the Civil Rights Act of 1964, challenging respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs. While § 703 (a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin, § 703 (h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate. The District Court found that respondent's former policy of racial discrimination had ended, and that Title VII, being prospective only, did not reach the prior inequities. The Court of Appeals reversed in part, rejecting the holding that residual discrimination arising from prior practices was insulated from remedial action, but agreed with the lower court that there was no showing of discriminatory purpose in the adoption of the diploma and test requirements. It held that, absent such discriminatory purpose, use of the requirements was permitted, and rejected the claim that because a disproportionate number of Negroes was rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job related. *Held:*

1. The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and, if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. Pp. 429–433.

2. The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force un-

less they are demonstrably a reasonable measure of job performance. Pp. 433–436.

420 F. 2d 1225, reversed in part.

BURGER, C. J., delivered the opinion of the Court, in which all members joined except BRENNAN, J., who took no part in the consideration or decision of the case.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III, Norman C. Amaker, William L. Robinson, Conrad O. Pearson, Julius LeVonne Chambers,* and *Albert J. Rosenthal.*

George W. Ferguson, Jr., argued the cause for respondent. With him on the brief were *William I. Ward, Jr.,* and *George M. Thorpe.*

Lawrence M. Cohen argued the cause for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance. With him on the brief were *Francis V. Lowden, Jr., Gerard C. Smetana,* and *Milton A. Smith.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Leonard, Deputy Solicitor General Wallace, David L. Rose, Stanley Hebert,* and *Russell Specter* for the United States; by *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *George D. Zuckerman* and *Dominick J. Tuminaro,* Assistant Attorneys General, for the Attorney General of the State of New York; and by *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman,* and *George H. Cohen* for the United Steelworkers of America, AFL–CIO.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school edu-

cation or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[1]

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the

[1] The Act provides:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer—

. . . . . .

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ." 78 Stat. 255, 42 U. S. C. § 2000e–2.

Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed.[2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared apti-

[2] A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

tude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3]

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

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[3] The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We granted the writ on these claims. 399 U. S. 926.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and re-

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[4] The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

[5] One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

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move barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes.[6] 420 F. 2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States,* 395 U. S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any

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[6] In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U. S. Bureau of the Census, U. S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl. Prac. Guide, ¶ 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70-552, CCH Empl. Prac. Guide, ¶ 6139 (Feb. 19, 1970).

person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the jobseeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test cri-

teria are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F. 2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

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[7] For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703 (h) of the Act.[8] That section authorizes the use of "any professionally developed ability test" that is not "designed, intended *or used* to discriminate because of race . . . ." (Emphasis added.)

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703 (h) to permit only the use of job-related tests.[9] The administrative interpretation of the

[8] Section 703 (h) applies only to tests. It has no applicability to the high school diploma requirement.

[9] EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.*, at § 1607.4 (c).

Act by the enforcing agency is entitled to great deference. See, *e. g., United States* v. *City of Chicago,* 400 U. S. 8 (1970); *Udall* v. *Tallman,* 380 U. S. 1 (1965); *Power Reactor Co.* v. *Electricians,* 367 U. S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Section 703 (h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.[10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247.[11] (Emphasis added.) Despite

[10] The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* (The decision is reprinted at 110 Cong. Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong. Rec. 5614–5616; Smathers, *id.,* at 5999–6000; Holland, *id.,* at 7012–7013; Hill, *id.,* at 8447; Tower, *id.,* at 9024; Talmadge, *id.,* at 9025–9026; Fulbright, *id.,* at 9599–9600; and Ellender, *id.,* at 9600.

[11] The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a

these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability tests." Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute." 110 Cong. Rec. 13504 (remarks of Sen. Case).

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of § 703 (h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: "Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this

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quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications*. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

amendment and have found it to be in accord with the intent and purpose of that title." 110 Cong. Rec. 13724. The amendment was then adopted.[12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703 (h) to require that employment tests be job related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[12] Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

Syllabus

GILLETTE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued December 9, 1970—Decided March 8, 1971*

Petitioner in No. 85, who was convicted for failure to report for induction, and petitioner in No. 325, who sought discharge from the armed forces upon receipt of orders for Vietnam duty, claim exemption from military service because of their conscientious objection to participation in the Vietnam conflict, as an "unjust" war, pursuant to § 6 (j) of the Military Selective Service Act of 1967. That section provides that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners also challenge the constitutionality of § 6 (j) as construed to cover only objectors to all war, as violative of the Free Exercise and Establishment of Religion Clauses of the First Amendment. *Held:*

1. The exemption for those who oppose "participation in war in any form" applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Pp. 441–448.

2. Section 6 (j) does not violate the Establishment Clause of the First Amendment. Pp. 448–460.

(a) The section on its face does not discriminate on the basis of religious affiliation or belief, and petitioners have not shown the absence of neutral, secular bases for the exemption. Pp. 450–453.

(b) The exemption provision focuses on individual conscientious belief and not on sectarian affiliations. P. 454.

(c) There are valid neutral reasons, with the central emphasis on the maintenance of fairness in the administration of military conscription, for the congressional limitation of the exemption to "war in any form," and therefore § 6 (j) cannot be said to reflect a religious preference. Pp. 454–460.

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*Together with No. 325, *Negre* v. *Larsen et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

3. Section 6 (j) does not violate the Free Exercise Clause. It is not designed to interfere with any religious practice and does not penalize any theological position. Any incidental burdens felt by petitioners are justified by the substantial governmental interests relating to military conscription. Pp. 461–462.

No. 85, 420 F. 2d 298, and No. 325, 418 F. 2d 908, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., concurred in the judgment and in Part I of the Court's opinion. DOUGLAS, J., filed dissenting opinions, *post*, p. 463 and p. 470.

Conrad J. Lynn argued the cause for petitioner in No. 85. With him on the brief were *Leon Friedman, Marvin M. Karpatkin,* and *Melvin L. Wulf. Richard Harrington* argued the cause for petitioner in No. 325. With him on the briefs were *Leigh Athearn, Stuart J. Land,* and *John T. Noonan, Jr.*

Solicitor General Griswold argued the cause for the United States and for the other respondents in both cases. With him on the briefs were *Assistant Attorney General Wilson* and *Beatrice Rosenberg.*

George T. Altman, pro se, filed a brief as *amicus curiae* in both cases. *Leo Rosen* filed a brief for the American Ethical Union as *amicus curiae* in No. 85. Briefs of *amici curiae* in No. 325 were filed by *Charles H. Tuttle* and *Thomas A. Shaw, Jr.*, for the National Council of the Churches of Christ in the U. S. A. et al.; by *Peter J. Donnici* for the Executive Board of the National Federation of Priests' Councils; by *Joseph B. Robison, Ephraim Margolin, Stanley J. Friedman, Seymour Farber,* and *Edwin J. Lukas* for the American Jewish Congress; by *Michael N. Pollet* and *Elsbeth Levy Bothe* for Louis P. Font; and by the American Friends Service Committee.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service. Specifically, we are called upon to decide whether conscientious scruples relating to a particular conflict are within the purview of established provisions[1] relieving conscientious objectors to war from military service. Both petitioners also invoke constitutional principles barring government interference with the exercise of religion and requiring governmental neutrality in matters of religion.

In No. 85, petitioner Gillette was convicted of wilful failure to report for induction into the armed forces. Gillette defended on the ground that he should have been ruled exempt from induction as a conscientious objector to war. In support of his unsuccessful request for classification as a conscientious objector, this petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as "unjust." Petitioner concluded that he could not in conscience enter and serve in the armed forces during the period of the Vietnam conflict. Gillette's view of his duty to abstain from any involvement in a war seen as unjust is, in his words, "based on a humanist approach to religion," and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.

[1] The relevant provisions are set down *infra*, at nn. 4, 5, and 6, and at accompanying text.

The District Court determined that there was a basis in fact to support administrative denial of exemption in Gillette's case. The denial of exemption was upheld, and Gillette's defense to the criminal charge rejected, not because of doubt about the sincerity or the religious character of petitioner's objection to military service, but because his objection ran to a particular war. In affirming the conviction, the Court of Appeals concluded that Gillette's conscientious beliefs "were specifically directed against the war in Vietnam," while the relevant exemption provision of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V), "requires opposition 'to participation in war in any form.'" 420 F. 2d 298, 299–300 (CA2 1970).

In No. 325, petitioner Negre, after induction into the Army, completion of basic training, and receipt of orders for Vietnam duty, commenced proceedings looking to his discharge as a conscientious objector to war. Application for discharge was denied, and Negre sought judicial relief by habeas corpus. The District Court found a basis in fact for the Army's rejection of petitioner's application for discharge. Habeas relief was denied, and the denial was affirmed on appeal, because, in the language of the Court of Appeals, Negre "objects to the war in Vietnam, not to all wars," and therefore does "not qualify for separation [from the Army], as a conscientious objector." [2] 418 F. 2d 908, 909–910 (CA9 1969). Again, no question is raised as to the sincerity or the religious quality of this petitioner's views. In line with religious counseling and numerous religious texts, Negre,

[2] Since petitioner Negre is no longer on active duty in the Army, the dispute in No. 325 lacks the same intensity that was present at the time that Negre commenced his habeas action. However, some possibility of Vietnam duty apparently remains, and the Government seems to concede that the case has not been mooted. We therefore pursue the matter no further.

a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between "just" and "unjust" wars, and to forswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and "all that I had been taught in my religious training."

We granted certiorari in these cases, 399 U. S. 925 (1970), in order to resolve vital issues concerning the exercise of congressional power to raise and support armies, as affected by the religious guarantees of the First Amendment. We affirm the judgments below in both cases.

I

Each petitioner claims a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples.[3] Both claims turn on the proper construction of § 6 (j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V), which provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [4]

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[3] Both petitioners asked to be spared all military responsibilities because of their objections to the Vietnam conflict—Gillette sought exemption from the draft; Negre sought discharge from the Army.

[4] Section 6 (j) provides further:

"As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemp-

This language controls Gillette's claim to exemption, which was asserted administratively prior to the point of induction. Department of Defense Directive No. 1300.6 (May 10, 1968), prescribes that post-induction claims to conscientious objector status shall be honored, if valid, by the various branches of the armed forces.[5] Section 6 (j) of the Act, as construed by the courts, is incorporated by the various service regulations issued pursuant to the Directive,[6] and thus the standards for measuring claims of in-service objectors, such as Negre, are the same as the statutory tests applicable in a pre-induction situation.

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tion from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces . . . , be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered . . . to perform . . . civilian work contributing to the maintenance of the national health, safety, or interest . . . ."

[5] The Directive states:

"IV. A. *National Policy*. [T]he Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form . . . shall not be inducted into the Armed Forces . . . .

"IV. B. *DoD Policy*. Consistent with this national policy, bona fide conscientious objection . . . by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized."

[6] DOD Directive No. 1300.6 itself states:

"Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining [conscientious objector status] of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service."

See also, *e. g.*, Army Regulations AR 635-20 (July 31, 1970), and AR 135-25 (Sept. 2, 1970).

For purposes of determining the statutory status of conscientious objection to a particular war, the focal language of § 6 (j) is the phrase, "conscientiously opposed to participation in war in any form." This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war. See *Welsh* v. *United States,* 398 U. S. 333, 340, 342 (1970); *id.,* at 347, 357 (concurring in result). See also *United States* v. *Kauten,* 133 F. 2d 703, 707 (CA2 1943). It matters little for present purposes whether the words, "in any form," are read to modify "war" or "participation." On the first reading, conscientious scruples must implicate "war in any form," and an objection involving a particular war rather than all war would plainly not be covered by § 6 (j). On the other reading, an objector must oppose "participation in war." It would strain good sense to read this phrase otherwise than to mean "participation in all war." For the word "war" would still be used in an unqualified, generic sense, meaning war as such. Thus, however the statutory clause be parsed, it remains that conscientious objection must run to war in any form.[7]

A different result cannot be supported by reliance on the materials of legislative history.[8] Petitioners and

[7] Moreover, a reading that attaches the words "in any form" to "participation," rather than to "war," would render § 6 (j) somewhat incoherent. For that section itself allows a person having the specified conscientious scruples to be assigned to noncombatant service in the armed forces, if he is not "found to be conscientiously opposed to participation in such noncombatant service." See n. 4, *supra.* In short, Congress had in mind that conscientious scruples should be honored if they implicate opposition to "war in any form," even though the objector may not be averse to a noncombatant form of "participation."

[8] The roots of § 6 (j) may be found in the earliest period of American history. See generally Selective Service System Monograph No. 11, Conscientious Objection 29–38 (1950). In 1775 the

amici point to no episode or pronouncement in the legislative history of § 6 (j), or of predecessor provisions, that tends to overthrow the obvious interpretation of the words themselves.[9]

Continental Congress announced its resolve to respect the beliefs of "people who from Religious Principles cannot bear Arms in any case . . . ." *Id.*, at 33–34. Against a background of state constitutional and statutory law exempting conscientious objectors from militia service, see *United States* v. *Seeger*, 380 U. S. 163, 170–171 (1965), Congress in 1864 explicitly exempted from the federal draft persons who "are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith [of their] religious denominations." 13 Stat. 9. The Draft Act of 1917 relieved from military service any person who belonged to "any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein . . . ." 40 Stat. 78. The Senate rejected an amendment to the 1917 legislation that would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war." 55 Cong. Rec. 1478. Subsequent exemption clauses have eliminated any restriction in terms of sectarian affiliation, and have made the exemption broadly available to any conscientious objector whose scruples concerning participation in war are grounded in "religious training and belief." Selective Training and Service Act of 1940, § 5 (g), 54 Stat. 889. But the phrase "participation in war in any form," used in the 1917 enactment, has, of course, survived the various revisions of the exempting provision.

[9] Petitioners' sole argument having specific reference to the legislative materials is utterly flawed. It runs as follows: the 1948 revision of the exempting provision was inspired in part by the dissent of Chief Justice Hughes in *United States* v. *Macintosh*, 283 U. S. 605 (1931); *Macintosh* involved a claimant whose conscientious scruples implicated only "unjust" wars, and the dissent remarked that "eminent statesmen here and abroad" have held such views, *id.*, at 635; thus Congress cannot fairly be deemed to have excluded objectors to particular wars from the 1948 exempting provision, predecessor to the present § 6 (j). However, the very most that can be said about congressional reliance on the *Macintosh* dissent is that Congress used it in fashioning a definition of the words "religious train-

It is true that the legislative materials reveal a deep concern for the situation of conscientious objectors to war, who absent special status would be put to a hard choice between contravening imperatives of religion and conscience or suffering penalties. Moreover, there are clear indications that congressional reluctance to impose such a choice stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state. See *United States* v. *Seeger*, 380 U. S. 163, 170–172 (1965); *United States* v. *Macintosh*, 283 U. S. 605, 631–634 (1931) (dissenting opinion). See generally Selective Service System Monograph No. 11, Conscientious Objection (1950). But there are countervailing considerations, which are also the concern of Congress,[10] and the legislative materials simply do not support the view that Congress intended to recognize any conscientious claim whatever as a basis for relieving the claimant from the general responsibility or the various incidents of military service. The claim that is recognized by § 6 (j) is a

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ing and belief." See *United States* v. *Seeger*, 380 U. S., at 172–179. The language of the exempting provision that is relevant to the present dispute—"participation in war in any form"—was not altered in 1948 or thereafter. Moreover, the *Macintosh* dissent does not itself suggest that conscientious objection to a particular war is or has ever been a basis for relief from military service. The claimant in *Macintosh* did not seek relief from military service—his contention, and that of the dissent, was that conscientious unwillingness to bear arms is not a disqualifying factor, under the language of the applicable loyalty oath, in a naturalization proceeding. (The argument of the dissent was later adopted by the Court in *Girouard* v. *United States*, 328 U. S. 61, 64 (1946).)

[10] See *infra*, at 454–460. See generally Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 50–51 (1967).

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claim of conscience running against war as such. This claim, not one involving opposition to a particular war only, was plainly the focus of congressional concern.

Finding little comfort in the wording or the legislative history of § 6 (j), petitioners rely heavily on dicta in the decisional law dealing with objectors whose conscientious scruples ran against war as such, but who indicated certain reservations of an abstract nature. It is instructive that none of the cases relied upon embraces an interpretation of § 6 (j) at variance with the construction we adopt today.[11]

Sicurella v. *United States*, 348 U. S. 385 (1955), presented the only previous occasion for this Court to focus on the "participation in war in any form" language of § 6 (j). In *Sicurella* a Jehovah's Witness who opposed participation in secular wars was held to possess the requisite conscientious scruples concerning war, although he was not opposed to participation in a "theocratic war" commanded by Jehovah. The Court noted that the "theocratic war" reservation was highly abstract—no such war had occurred since biblical times, and none was contemplated. Congress, on the other hand, had in mind "real shooting wars," *id.*, at 391, and Sicurella's abstract reservations did not undercut his conscientious opposition to participating in such wars. Plainly, *Sicurella* cannot be read to support the claims of those, like petitioners,

[11] Perhaps more significant is the fact that even lower courts that have granted relief to claimants who object to particular wars, have done so on constitutional, not statutory, grounds, and have found § 6 (j) defective because it does not admit of such relief. See, *e. g.*, *United States* v. *McFadden*, 309 F. Supp. 502 (ND Cal. 1970), app. docketed, No. 422, O. T. 1970; *United States* v. *Sisson*, 297 F. Supp. 902 (Mass. 1969), appeal dismissed for want of jurisdiction, 399 U. S. 267 (1970). Since we conclude that § 6 (j), interpreted in the obvious way, suffers no constitutional infirmity, there is no temptation to expand its intended scope by constructional fiat in order to "save" it.

who for a variety of reasons consider one particular "real shooting war" to be unjust, and therefore oppose participation in that war.[12]

It should be emphasized that our cases explicating the "religious training and belief" clause of § 6 (j), or cognate clauses of predecessor provisions, are not relevant to the present issue. The question here is not whether these petitioners' beliefs concerning war are "religious" in nature. Thus, petitioners' reliance on *United States* v. *Seeger*, 380 U. S. 163, and *Welsh* v. *United States*, 398 U. S. 333, is misplaced. Nor do we decide that conscientious objection to a particular war necessarily falls within § 6 (j)'s expressly excluded class[13] of "essentially political, sociological, or philosophical views, or a merely personal moral code." Rather, we hold that Congress intended to exempt persons who oppose participating in all war—"participation in war in any form"—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is "religious" in character.

A further word may be said to clarify our statutory holding. Apart from abstract theological reservations, two other sorts of reservations concerning use of force have been thought by lower courts not to defeat a con-

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[12] After noting that Sicurella's faith involved willingness to engage in theocratic conflict, though "without carnal weapons," the Court stated: "The test is not whether the registrant is opposed to all war, but whether he is opposed . . . to *participation* in war." 348 U. S., at 390. The plain purport of this statement is that opposition to theocratic war is not exacted, since Congress quite reasonably considered participation in "real shooting wars" to be the only sort of participation at stake. See also *Taffs* v. *United States*, 208 F. 2d 329, 331 (CA8 1953), cert. denied, 347 U. S. 928 (1954).

[13] See n. 4, *supra*.

scientious objector claim. Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such. See, *e. g., United States* v. *Haughton,* 413 F. 2d 736, 740–742 (CA9 1969); *United States* v. *Carroll,* 398 F. 2d 651, 655 (CA3 1968). But surely willingness to use force defensively in the personal situations mentioned is quite different from willingness to fight in some wars but not in others. Cf. *Sicurella* v. *United States,* 348 U. S., at 389. Somewhat more apposite to the instant situation are cases dealing with persons who oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable. See, *e. g., United States* v. *Owen,* 415 F. 2d 383, 390 (CA8 1969). Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant's present sincerity of belief. At any rate there is an obvious difference between present sincere objection to all war, and present opposition to participation in a particular conflict only.

II

Both petitioners argue that § 6 (j), construed to cover only objectors to all war, violates the religious clauses of the First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature. While the two religious clauses—pertaining to "free exercise" and

"establishment" of religion—overlap and interact in many ways, see *Abington School District* v. *Schempp*, 374 U. S. 203, 222–223 (1963); Freund, Public Aid To Parochial Schools, 82 Harv. L. Rev. 1680, 1684 (1969), it is best to focus first on petitioners' other contention, that § 6 (j) is a law respecting the establishment of religion. For despite free exercise overtones, the gist of the constitutional complaint is that § 6 (j) impermissibly discriminates among types of religious belief and affiliation.[14]

On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature, within the meaning of the Amendment as well as this Court's decisions construing § 6 (j), petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6 (j), properly construed, has this effect. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion.

An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. See *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968); *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947). Here

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[14] Petitioners also assert that the Fifth Amendment's Due Process Clause is violated, because the distinction embodied in § 6 (j)—between objectors to all war and objectors to particular wars—is arbitrary and capricious and works an invidious discrimination in contravention of the "equal protection" principles encompassed by the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). This is not an independent argument in the context of these cases. Cf. *Walz* v. *Tax Commission*, 397 U. S. 664, 696 (1970) (opinion of HARLAN, J.). We hold that the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that the line is neither arbitrary nor invidious.

there is no claim that exempting conscientious objectors to war amounts to an overreaching of secular purposes and an undue involvement of government in affairs of religion. Cf. *Walz* v. *Tax Commission*, 397 U. S. 664, 675 (1970); *id.*, at 695 (opinion of HARLAN, J.). To the contrary, petitioners ask for greater "entanglement" by judicial expansion of the exemption to cover objectors to particular wars. Necessarily the constitutional value at issue is "neutrality." And as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. See *Engel* v. *Vitale*, 370 U. S. 421, 430–431 (1962); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961). The metaphor of a "wall" or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis, see *Walz* v. *Tax Commission*, *supra*, at 668–669; *Zorach* v. *Clauson*, 343 U. S. 306, 312–313 (1952), but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. *Abington School District* v. *Schempp*, 374 U. S., at 222; *id.*, at 231 (BRENNAN, J., concurring); *id.*, at 305 (Goldberg, J., concurring).

A

The critical weakness of petitioners' establishment claim arises from the fact that § 6 (j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specified objection must have a grounding in "religious training and belief," but no par-

ticular sectarian affiliation or theological position is required. The Draft Act of 1917, § 4, 40 Stat. 78, extended relief only to those conscientious objectors affiliated with some "well-recognized religious sect or organization" whose principles forbade members' participation in war, but the attempt to focus on particular sects apparently broke down in administrative practice, *Welsh* v. *United States*, 398 U. S., at 367 n. 19 (concurring in result), and the 1940 Selective Training and Service Act, § 5 (g), 54 Stat. 889, discarded all sectarian restriction.[15] Thereafter Congress has framed the conscientious objector exemption in broad terms compatible with "its long-established policy of not picking and choosing among religious beliefs." *United States* v. *Seeger*, 380 U. S., at 175.

Thus, there is no occasion to consider the claim that when Congress grants a benefit expressly to adherents of one *religion*, courts must either nullify the grant or somehow extend the benefit to cover all religions. For § 6 (j) does not single out any religious organization or religious creed for special treatment. Rather petitioners' contention is that since Congress has recognized one sort of conscientious objection concerning war, whatever its religious basis, the Establishment Clause commands that another, different objection be carved out and protected by the courts.[16]

Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works

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[15] See n. 8, *supra*.

[16] Since we hold that the "participation in war in any form" clause of § 6 (j) does not violate the First Amendment, there is little point in dealing with the problems that would be involved in deciding whether invalidity of the restrictive clause should lead to judicial nullification of the exemption *in toto* or judicial expansion to cure "underinclusiveness."

a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course, this contention of de facto religious discrimination, rendering § 6 (j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6 (j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses. *Walz* v. *Tax Commission*, 397 U. S., at 696 (opinion of HARLAN, J.). See also *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (opinion of Warren, C. J.); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 213, 232 (1948) (opinion of Frankfurter, J.). Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn. See *Epperson* v. *Arkansas*, 393 U. S., at 107–109; *Board of Education* v. *Allen*, 392 U. S. 236, 248 (1968); *McGowan* v. *Maryland*, 366 U. S. 420, 442–444 (1961); *id.*, at 468 (separate opinion of Frankfurter, J.). For the reasons that follow, we believe that petitioners have failed to make the requisite showing with respect to § 6 (j).

Section 6 (j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions.[17] There are considera-

[17] The exemption provision of the Draft Act of 1917, § 4, 40 Stat. 78, was upheld in the *Selective Draft Law Cases*, 245 U. S. 366, 389–390 (1918), at an early stage in the development of First Amend-

tions of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, *Welsh* v. *United States,* 398 U. S., at 369 (WHITE, J., dissenting), but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." *United States* v. *Macintosh,* 283 U. S. 605, 633 (1931) (Hughes, C. J., dissenting). See *United States* v. *Seeger,* 380 U. S., at 170–172. We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.[18]

Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption,[19] it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States* v. *Macintosh, supra,* at 634 (Hughes, C. J., dissenting). See *Abington School District* v. *Schempp,* 374 U. S., at 294–299 (BRENNAN, J., concurring); *id.,* at 306 (Goldberg, J., concurring); *id.,* at 309 (STEWART, J., dissent-

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ment doctrine, against a constitutional attack apparently founded on both the Establishment and Free Exercise Clauses. A single sentence was devoted to the complainants' First Amendment argument, "because we think its unsoundness is too apparent to require us to do more." *Id.,* at 390.

[18] See *supra,* at 445–446.

[19] See n. 23, *infra.*

ing). See also *Welsh* v. *United States*, 398 U. S., at 370–373 (WHITE, J., dissenting). "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, *Walz* v. *Tax Commission*, 397 U. S., at 669, so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

In this state of affairs it is impossible to say that § 6 (j) intrudes upon "voluntarism" in religious life, see *id.*, at 694–696 (opinion of HARLAN, J.), or that the congressional purpose in enacting § 6 (j) is to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war. A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6 (j) encourages membership in putatively "favored" religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations.

B

We conclude not only that the affirmative purposes underlying § 6 (j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." [20] When the Government exacts so much, the importance of fair, evenhanded, and uniform decisionmaking is obviously intensified. The Government argues that the interest in fairness would be jeopardized by expansion of § 6 (j) to include conscientious objection to a particular war. The contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice.

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." [21] All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. See *United States* v. *Kauten*, 133 F. 2d, at 708. The difficulties of sort-

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[20] The Report of the National Advisory Commission on Selective Service (1967) is aptly entitled In Pursuit of Equity: Who Serves When Not All Serve?

[21] Matters relevant to such an objection, as the papers in these cases show, are whether the purposes of the war are thought ultimately defensive and pacific, or otherwise; whether the conflict is legal, or its prosecution decided upon by legal means; whether the implements of war are used humanely, or whether certain weapons should be used at all. A war may be thought "just" or not depending on one's assessment of these factors and many more: the character of the foe, or of allies; the place the war is fought; the likelihood that a military clash will issue in benefits, of various kinds, enough to override the inevitable costs of the conflict. And so on.

ing the two, with a sure hand, are considerable. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole. In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results . . . ." Brief 28.

For their part, petitioners make no attempt to provide a careful definition of the claim to exemption that they ask the courts to carve out and protect. They do not explain why objection to a particular conflict—much less an objection that focuses on a particular facet of a conflict—should excuse the objector from all military service whatever, even from military operations that are connected with the conflict at hand in remote or tenuous ways.[22] They suggest no solution to the problems arising from the fact that altered circumstances may quickly render the objection to military service moot.

To view the problem of fairness and evenhanded decisionmaking, in the present context, as merely a commonplace chore of weeding out "spurious claims," is to minimize substantial difficulties of real concern to a responsible legislative body. For example, under the petitioners' unarticulated scheme for exemption, an objector's claim to exemption might be based on some feature of a current conflict that most would regard as incidental,

[22] See n. 3, *supra*.

or might be predicated on a view of the facts that most would regard as mistaken. The particular complaint about the war may itself be "sincere," but it is difficult to know how to judge the "sincerity" of the objector's conclusion that the war *in toto* is unjust and that any personal involvement would contravene conscience and religion. To be sure we have ruled, in connection with § 6 (j), that "the 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held." *United States* v. *Seeger,* 380 U. S., at 185. See also *United States* v. *Ballard,* 322 U. S. 78 (1944). But we must also recognize that "sincerity" is a concept that can bear only so much adjudicative weight.

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled. There is even a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. At any rate, it is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. *Walz* v. *Tax Commission,* 397 U. S., at 698–699 (opinion of

HARLAN, J.). Cf. *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church,* 393 U. S. 440 (1969). While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory.

In addition to the interest in fairness, the Government contends that neutral, secular reasons for the line drawn by § 6 (j)—between objection to all war and objection to a particular war—may be found in the nature of the conscientious claim that these petitioners assert. Opposition to a particular war, states the Government's brief, necessarily involves a judgment "that is political and particular," one "based on the same political, sociological and economic factors that the government necessarily considered" in deciding to engage in a particular conflict. Brief 24–26. Taken in a narrow sense, these considerations do not justify the distinction at issue, for however "political and particular" the judgment underlying objection to a particular war, the objection still might be rooted in religion and conscience, and although the factors underlying that objection were considered and rejected in the process of democratic decisionmaking, likewise the viewpoint of an objector to all war was no doubt considered and "necessarily" rejected as well. Nonetheless, it can be seen on a closer view that this line of analysis, conjoined with concern for fairness, does support the statutory distinction.

Tacit at least in the Government's view of the instant cases is the contention that the limits of § 6 (j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance. Despite emphasis on claims that have a "political and particular" component, the logic of the

contention is sweeping. Thus the "interest" invoked is highly problematical, for it would seem to justify governmental refusal to accord any breathing space whatever to noncompliant conduct inspired by imperatives of religion and conscience.

On the other hand, some have perceived a danger that exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would "open the doors to a general theory of selective disobedience to law" and jeopardize the binding quality of democratic decisions. Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 50 (1967). See also *Hamilton* v. *Regents*, 293 U. S. 245, 268 (1934) (Cardozo, J., concurring). Other fields of legal obligation aside, it is undoubted that the nature of conscription, much less war itself, requires the personal desires and perhaps the dissenting views of those who must serve to be subordinated in some degree to the pursuit of public purposes. It is also true that opposition to a particular war does depend *inter alia* upon particularistic factual beliefs and policy assessments, beliefs and assessments that presumably were overridden by the government that decides to commit lives and resources to a trial of arms. Further, it is not unreasonable to suppose that some persons who are *not* prepared to assert a conscientious objection, and instead accept the hardships and risks of military service, may well agree at all points with the objector, yet conclude, as a matter of conscience, that they are personally bound by the decision of the democratic process. The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the

prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict.

We need not and do not adopt the view that a categorical, global "interest" in stifling individualistic claims to noncompliance, in respect of duties generally exacted, is the neutral and secular basis of § 6 (j). As is shown by the long history of the very provision under discussion, it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature. But real dangers—dangers of the kind feared by the Commission—might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government. In short, the considerations mentioned in the previous paragraph, when seen in conjunction with the central problem of fairness, are without question properly cognizable by Congress. In light of these valid concerns, we conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.

Of course, we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars. Our analysis of the policies of § 6 (j) is undertaken in order to determine the existence *vel non* of a neutral, secular justification for the lines Congress has drawn. We find that justifying reasons exist and therefore hold that the Establishment Clause is not violated.

III

Petitioners' remaining contention is that Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion. Strictly viewed, this complaint does not implicate problems of comparative treatment of different sorts of objectors, but rather may be examined in some isolation from the circumstance that Congress has chosen to exempt those who conscientiously object to all war.[23] And our holding that § 6 (j) comports with the Establishment Clause does not automatically settle the present issue. For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own. *Abington School District* v. *Schempp,* 374 U. S., at 222–223.

Nonetheless, our analysis of § 6 (j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government. See *Cantwell* v. *Connecticut,*

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[23] We are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars. A free exercise claim on behalf of such objectors collides with the distinct governmental interests already discussed, and, at any rate, no other claim is presented. We note that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution. See *Hamilton* v. *Regents,* 293 U. S. 245, 264 (1934); *United States* v. *Macintosh,* 283 U. S., at 623–624; cf. *In re Summers,* 325 U. S. 561, 572–573 (1945).

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310 U. S. 296, 303–304 (1940); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905); cf. *Cleveland* v. *United States*, 329 U. S. 14, 20 (1946). To be sure, the Free Exercise Clause bars "governmental regulation of religious *beliefs* as such," *Sherbert* v. *Verner*, 374 U. S. 398, 402 (1963), or interference with the dissemination of religious ideas. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). It prohibits misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions, . . . even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U. S., at 607 (opinion of Warren, C. J.). And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims. See *id.*; *Sherbert* v. *Verner*, *supra*. See generally Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969). However, the impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8.

IV

Since petitioners' statutory and constitutional claims to relief from military service are without merit, it follows that in Gillette's case (No. 85) there was a basis in fact to support administrative denial of exemption, and that in Negre's case (No. 325) there was a basis in fact to support the Army's denial of a discharge. Accordingly, the judgments below are

Affirmed.

MR. JUSTICE BLACK concurs in the Court's judgment and in Part I of the opinion of the Court.

MR. JUSTICE DOUGLAS, dissenting in No. 85.*

Gillette's objection is to combat service in the Vietnam war, not to wars in general, and the basis of his objection is his conscience. His objection does not put him into the statutory exemption which extends to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [1]

He stated his views as follows:

> "I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically 'Humanism.' This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition."

This position is substantially the same as that of Sisson in *United States* v. *Sisson*, 297 F. Supp. 902, ap-

*[For dissenting opinion of MR. JUSTICE DOUGLAS in No. 325, *Negre* v. *Larsen*, see *post*, p. 470.]

[1] Section 6 (j), Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V).

peal dismissed, 399 U. S. 267, where the District Court summarized the draftee's position as follows:

> "Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp., at 905.

There is no doubt that the views of Gillette are sincere, genuine, and profound. The District Court in the present case faced squarely the issue presented in *Sisson* and being unable to distinguish the case on the facts, refused to follow *Sisson*.

The question, Can a conscientious objector, whether his objection be rooted in "religion" or in moral values, be required to kill? has never been answered by the Court.[2] *Hamilton* v. *Regents*, 293 U. S. 245, did no more than hold that the Fourteenth Amendment did not require a State to make its university available to one who would not take military training. *United States* v. *Macintosh*, 283 U. S. 605, denied naturalization to a person who "would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified." *Id.*, at 613. The question of compelling a man to kill against his conscience was not squarely involved. Most of the talk in the majority opinion concerned "serving in the armed forces of the

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[2] See T. Powell, Conscience and the Constitution, in Democracy and National Unity (W. Hutchison ed. 1941).

It is probably a universal truth that "the one thing which authority, whether political, social, religious or economic, tends instinctively to fear is the insistence of conscience." Mehta, The Conscience of a Nation or Studies in Gandhism p. ii (Calcutta, 1933).

Nation in time of war." *Id.*, at 623. Such service can, of course, take place in noncombatant roles. The ruling was that such service is "dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides." *Ibid.* The *dicta* of the Court in the *Macintosh* case squint towards the denial of Gillette's claim, though as I have said, the issue was not squarely presented.

Yet if dicta are to be our guide, my choice is the dicta of Chief Justice Hughes who, dissenting in *Macintosh*, spoke as well for Justices Holmes, Brandeis, and Stone:

> "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." *Id.*, at 635.

I think the Hughes view is the constitutional view. It is true that the First Amendment speaks of the free exercise of religion, not of the free exercise of conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the

bedrock of free speech as well as religion. The implied First Amendment right of "conscience" is certainly as high as the "right of association" which we recognized in *Shelton* v. *Tucker,* 364 U. S. 479, and *NAACP* v. *Alabama,* 357 U. S. 449. Some indeed have thought it higher.[3]

Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense.

Tolstoy [4] wrote of a man, one Van der Veer, "who, as he himself says, is not a Christian, and who refuses military service, not from religious motives, but from motives of the simplest kind, motives intelligible and common to all men, of whatever religion or nation, whether Catholic, Mohammedan, Buddhist, Confucian, whether Spaniards or Japanese.

> "Van der Veer refuses military service, not because he follows the commandment. 'Thou shalt do no murder,' not because he is a Christian, but because he holds murder to be opposed to human nature."

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[3] See M. Konvitz, Religious Liberty and Conscience 106 (1968); Redlich & Feinberg, Individual Conscience and the Selective Service Objector: The Right Not to Kill, 44 N. Y. U. L. Rev. 875, 891 (1969): "Free expression and the right of personal conscientious belief are closely intertwined. At the core of the first amendment's protection of individual expression, is the recognition that such expression represents the oral or written manifestation of conscience. The performance of certain acts, under certain circumstances, involves such a crisis of conscience as to invoke the protection which the first amendment provides for similar manifestations of conscience when expressed in verbal or written expressions of thought. The most awesome act which any society can demand of a citizen's conscience is the taking of a human life."

[4] L. Tolstoy, Writings On Civil Disobedience and Non-Violence 12 (1967).

Tolstoy [5] goes on to say:

> "Van der Veer says he is not a Christian. But the motives of his refusal and action are Christian. He refuses because he does not wish to kill a brother man; he does not obey, because the commands of his conscience are more binding upon him than the commands of men. . . . Thereby he shows that Christianity is not a sect or creed which some may profess and others reject; but that it is naught else than a life's following of that light of reason which illumines all men. . . .
>
> "Those men who now behave rightly and reasonably do so, not because they follow prescriptions of Christ, but because that line of action which was pointed out eighteen hundred years ago has now become identified with human conscience."

The "sphere of intellect and spirit," as we described the domain of the First Amendment in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642, was recognized in *United States* v. *Seeger*, 380 U. S. 163, where we gave a broad construction to the statutory exemption of those who by their religious training or belief are conscientiously opposed to participation in war in any form. We said: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by

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[5] *Id.*, at 15–16. And see Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 337 (1969):

"The argument is not merely that avoiding compulsion of a man's conscience produces the greatest good for the greatest number, but that such compulsion is itself unfair to the individual concerned. The moral condemnation implicit in the threat of criminal sanctions is likely to be very painful to one motivated by belief. Furthermore, the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect."

the God of those admittedly qualifying for the exemption comes within the statutory definition." *Id.*, at 176.[6]

Seeger does not answer the present question as Gillette is not "opposed to participation in war in any form."

But the constitutional infirmity in the present Act seems obvious once "conscience" is the guide. As Chief Justice Hughes said in the *Macintosh* case:

> "But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U. S., at 633–634.

The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples. MR. JUSTICE BLACK once said: "The First Amendment has lost much if the religious follower and the atheist[7] are no longer to be

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[6] In *Welsh* v. *United States*, 398 U. S. 333, four Justices elaborated on *Seeger*, stating:

"The Court [in *Seeger*] made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. . . . What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions." *Id.*, at 339–340.

[7] Article VI of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Torcaso* v. *Watkins*, 367 U. S. 488, upheld the right of a nonbeliever to hold public office.

judicially regarded as entitled to equal justice under law." *Zorach* v. *Clauson,* 343 U. S. 306, 320 (dissenting). We said as much in our recent decision in *Epperson* v. *Arkansas,* 393 U. S. 97, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.,* at 103–104.

While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process. *Bolling* v. *Sharpe,* 347 U. S. 497, 500, held that segregation by race in the public schools was an invidious discrimination, and *Schneider* v. *Rusk,* 377 U. S. 163, 168–169, reached the same result based on penalties imposed on naturalized, not native-born, citizens. A classification of "conscience" based on a "religion" and a "conscience" based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards.

I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment.

This is an appropriate occasion to give content to our dictum in *Board of Education* v. *Barnette, supra,* at 642:

> "[F]reedom to differ is not limited to things that do not matter much. . . . The test of its sub-

stance is the right to differ as to things that touch the heart of the existing order."

I would reverse this judgment.

MR. JUSTICE DOUGLAS, dissenting in No. 325, *Negre* v. *Larsen*.

I approach the facts of this case with some diffidence, as they involve doctrines of the Catholic Church in which I was not raised. But we have on one of petitioner's briefs an authoritative lay Catholic scholar, Dr. John T. Noonan, Jr., and from that brief I deduce the following:

Under the doctrines of the Catholic Church a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars.[1] Conversely, a Catholic has a moral duty not to participate in unjust wars.[2]

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[1] The theological basis for this was explained by Pope John XXIII in Part II of Pacem in Terris ¶ 46 (Paulist Press 1963): "Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions . . . . These however derive their authority from God, as St. Paul teaches in the words, *There exists no authority except from God.* These words of St. Paul are explained thus by St. John Chrysostom: . . . *What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey.*" ¶ 50 adds: "When, in fact, men obey their rulers, it is not at all as men that they obey them, but through their obedience it is God . . . since He has decreed that men's dealings with one another should be regulated by an order which He Himself has established."

[2] "Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since *we must obey God rather than men.*" *Id.*, at ¶ 51.

The Fifth Commandment, "Thou shall not kill," provides a basis for the distinction between just and unjust wars. In the 16th century Francisco Victoria, Dominican master of the University of Salamanca and pioneer in international law, elaborated on the distinction. "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person." He realized not all men had the information of the prince and his counsellors on the causes of a war, but where "the proofs and tokens of the injustice of the war may be such that ignorance would be no excuse even to the subjects" who are not normally informed, that ignorance will not be an excuse if they participate.[3] Well over 400 years later, today, the Baltimore Catechism makes an exception to the Fifth Commandment for a "soldier fighting a just war." [4]

No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts.[5]

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[3] De Indis Relectio Posterior, sive De Iure Belli Hispanorum in Barbaros, translated in Classics of International Law 173–174 (E. Nys ed. 1917).

[4] P. 205 (official rev. ed. 1949).

[5] Pope Paul VI in § 16 of the Pastoral Constitution on the Church in the Modern World states:

"Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and avoid evil, tells him inwardly at the right moment to do this or to shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged."

A. Fagothey, Right and Reason: Ethics in Theory and Practice 38 (4th ed. 1967) states: "Hence a certain conscience must be obeyed, not only when it is correct, but even when it is invincibly erroneous

Like the distinction between just and unjust wars, the duty to obey conscience is not a new doctrine in the Catholic Church. When told to stop preaching by the Sanhedrin, to which they were subordinate by law, "Peter and the apostles answered and said, 'We must obey God rather than men.'" [6] That duty has not changed. Pope Paul VI has expressed it as follows: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience, in order that he may come to God, the end and purpose of life." [7]

While the fact that the ultimate determination of whether a war is unjust rests on individual conscience, the Church has provided guides. Francisco Victoria referred to "killing of an innocent person." World War II had its impact on the doctrine. Writing shortly after the war Cardinal Ottaviani stated: "[M]odern wars can

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[unrealized error]. Conscience is the only guide a man has for the performance of concrete actions here and now. But an invincibly erroneous conscience cannot be distinguished from a correct conscience. Therefore if one were not obliged to follow a certain but invincibly erroneous conscience, we should be forced to the absurd conclusions that one would not be obliged to follow a certain and correct conscience." On this matter § 16 of the Pastoral Constitution adds: "Yet it often happens that conscience goes astray through ignorance which it is unable to avoid, but under such circumstances it does not lose its dignity. This cannot be said of the man who takes little trouble to find out what is true and good."

[6] Acts 5:29 (Standard ed. 1900).

[7] Declaration on Religious Freedom I:3 in Documents of Vatican Council II, p. 369 (Newman Press 1966). See also "Human Life in Our Day" issued by the National Conference of Catholic Bishops (Nov. 15, 1968): "Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issue of war and peace, all men will follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force of universal natural law and its all embracing principles,' to which 'man's conscience itself gives ever more emphatic voice.'"

never fulfil those conditions which (as we stated earlier on in this essay) govern—theoretically—a just and lawful war. Moreover, no conceivable cause could ever be sufficient justification for the evils, the slaughter, the destruction, the moral and religious upheavals which war today entails. *In practice, then, a declaration of war will never be justifiable.*" [8] The full impact of the horrors of modern war were emphasized in the Pastoral Constitution announced by Vatican II:

> "The development of armaments by modern science has immeasurably magnified the horrors and wickedness of war. Warfare conducted with these weapons can inflict immense and indiscriminate havoc which goes far beyond the bounds of legitimate defense. Indeed, if the kind of weapons now stocked in the arsenals of the great powers were to be employed to the fullest, the result would be the almost complete reciprocal slaughter of one side by the other, not to speak of the widespread devastation that would follow in the world and the deadly aftereffects resulting from the use of such arms.
>
> "All these factors force us to undertake a completely fresh reappraisal of war. . . ."
>
> "[I]t is one thing to wage a war of self-defense; it is quite another to seek to impose domination on another nation. . . ."

The Pastoral Constitution announced that "[e]very act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man which merits firm and unequivocal condemnation." [9]

Louis Negre is a devout Catholic. In 1951 when he was four, his family immigrated to this country from

[8] The Future of Offensive War, 30 Blackfriars 415, 419 (1949).

[9] Pastoral Constitution ¶¶ 79, 80.

France.[10] He attended Catholic schools in Bakersfield, California, until graduation from high school. Then he attended Bakersfield Junior College for two years. Following that, he was inducted into the Army.

At the time of his induction he had his own convictions about the Vietnam war and the Army's goals in the war. He wanted, however, to be sure of his convictions. "I agreed to myself that before making any decision or taking any type of stand on the issue, I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam. For, without getting an insight on the subject, it would be unfair for me to say anything, without really knowing the answer." [11]

On completion of his advanced infantry training, "I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training." Negre applied for a discharge as a conscientious objector. His application was denied. He then refused to comply with an order to proceed for shipment to Vietnam. A general court-martial followed, but he was acquitted. After that he filed this application for discharge as a conscientious objector.

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[10] Petitioner suggests that one of the reasons his parents left France was their opposition to France's participation in the Indo-China war.

[11] See n. 5, *supra*. Fagothey, *supra*, n. 5, at 37 states: "What degree of certitude is required? It is sufficient that the conscience be *prudentially certain*. Prudential certitude is not absolute but relative. It excludes all *prudent* fear that the opposite may be true, but it does not rule out imprudent fears based on bare possibilities. The reasons are strong enough to satisfy a normally prudent man in an important matter, so that he feels safe in practice though there is a theoretical chance of his being wrong. He has taken every reasonable precaution, but cannot guarantee against rare contingencies and freaks of nature."

Negre is opposed under his religious training and beliefs to participation in any form in the war in Vietnam. His sincerity is not questioned. His application for a discharge, however, was denied because his religious training and beliefs led him to oppose only a particular war [12] which according to his conscience was unjust.

For the reasons I have stated in my dissent in the *Gillette* case decided this day, I would reverse the judgment.

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[12] "For those middle-aged people who find themselves baffled by the current widespread resistance to the draft, a Stanford University student has provided a useful parallel.

"Addressing a hearing of the Senate Armed Service Committee . . . , Peter Knutson said that 'If, during the course of the Second World War, America had entered on the side of Hitler's Germany, would you have allowed yourself to be drafted? Would you have blindly said my country right or wrong?'

"That is about as well as the anti-draft cause has ever been stated. . . .

"It may seem far-fetched to suppose that America ever would have fought on the side of Hitler, but that too is beside the point. If today's World War II veteran will try to imagine what he might have done had he been drafted under those circumstances, he will be able to understand some part of the dilemma that the Vietnam war has imposed on this generation of draftees. It has been a real dilemma breeding powerful frustrations, and its residues will long outlast the war."—L. H.—Lewiston (Ida.) Tribune.

ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* HARGRAVE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 573. Argued February 23–24, 1971—Decided March 8, 1971

Appellees brought this suit in federal court challenging Florida's Millage Rollback Law as violative of the Equal Protection Clause of the Fourteenth Amendment on the ground that it had an invidiously discriminatory effect in its distribution of taxing authority for educational purposes by a standard related solely to a county's wealth. Appellants contended that the statute was only part of a total plan more nearly to equalize schoolchildren's educational opportunities on a statewide basis. A three-judge District Court granted appellees' motion for summary judgment on the basis of the pleadings and appellees' affidavit, having rejected appellants' argument that the District Court should abstain from considering the case because of an intervening state court proceeding attacking the law on state constitutional grounds. *Held:*

1. The District Court mistakenly relied upon *Monroe* v. *Pape*, 365 U. S. 167, and *McNeese* v. *Board of Education*, 373 U. S. 668, in refusing to abstain from deciding the case on the merits pending resolution by the state courts of state constitutional claims, the sustainment of which would obviate the need for determining the Fourteenth Amendment issue. *Reetz* v. *Bozanich*, 397 U. S. 82, is an example of the line of decisions that should inform the discretion of the District Court in determining whether to abstain.

2. Since the manner in which Florida's overall program operates may be critical in resolving the equal protection claim, that claim should be decided not by summary judgment but after a full hearing.

313 F. Supp. 944, vacated and remanded.

Charles E. Miner, Jr., argued the cause for appellants. With him on the briefs were *Rivers Buford, Jr.*, and *Stephen Marc Slepin*.

Hershel Shanks argued the cause for appellees. With him on the brief were *Allan I. Mendelsohn, Robert M. Perce, Jr., Richard H. Frank*, and *David Rubin*.

William H. Adams III filed a brief for the Florida Education Research Foundation as *amicus curiae* urging reversal.

PER CURIAM.

In 1968, Florida enacted a new law for the financing of public education through state appropriations and local *ad valorem* taxes assessed by each school district. A section of the new law, Fla. Stat. Ann. § 236.251 (Supp. 1970), known as the "Millage Rollback Law," provided that, to be eligible to receive state moneys, a local school district must limit *ad valorem* taxes for school purposes to not more than 10 mills of assessed valuation, with certain exceptions. Appellees filed this class action in the District Court for the Middle District of Florida alleging that the Millage Rollback Law effected an invidious discrimination, in violation of the Equal Protection Clause, against school children of property-poor counties in that 10 mills of *ad valorem* tax in school districts in such counties would produce less dollars per child for educational purposes than would 10 mills of *ad valorem* tax in other counties. A three-judge District Court entered a summary judgment in appellees' favor upon a declaration that the Millage Rollback Law was unconstitutional, and enjoined the appellants from withholding state funds from any school district by virtue of the provisions of that Act. *Hargrave* v. *Kirk*, 313 F. Supp. 944 (1970). We noted probable jurisdiction. 400 U. S. 900 (1970). We vacate and remand.

I

Subsequent to the filing of this suit, *School Board of Broward County* v. *Christian*, No. 69–932, was filed in the Circuit Court of the Second Judicial Circuit of Leon County, Florida. That action attacks the Millage Rollback Law primarily on state law grounds, as violative of

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provisions of the Florida Constitution. The District Court, however, rejected appellants' argument that the court "should abstain from considering the case in deference to [the] state court proceeding," 313 F. Supp., at 946–947, holding that under *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), "[t]he fact that a state remedy is available is not a valid basis for federal court abstention." 313 F. Supp., at 947. The reliance upon *Monroe* v. *Pape* and *McNeese* was misplaced. *Monroe* v. *Pape* is not in point, for there "the state remedy, though adequate in theory, was not available in practice." 365 U. S., at 174. *McNeese* held that "assertion of a federal claim in a federal court [need not] await an attempt to vindicate *the same claim* in a state court." 373 U. S., at 672 (emphasis added). See also *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971). Our understanding from the colloquy on oral argument with counsel for the parties is that the *Christian* case asserts, not the "same claim," that is, the federal claim of alleged denial of the federal right of equal protection, but primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question. In such case, the line of decisions of which *Reetz* v. *Bozanich*, 397 U. S. 82 (1970), is a recent example, states the principles that should inform the exercise of the District Court's discretion as to whether to abstain.

II

Since the case must be remanded, we add another comment. The appellees' motion for summary judgment was considered on the pleadings and an affidavit which essentially merely verified the allegations of the amended complaint. Our examination of the pleadings and the affidavit persuades us that they are inadequate as a basis for deciding the equal protection claim. They do

not sufficiently present the facts related to appellants' argument that the Millage Rollback Law was only one aspect of a comprehensive legislative program for reorganizing educational financing throughout the State to more nearly equalize educational opportunities for all the school children of the State. Appellants contend that this program enacted a formula calling for "a massive infusion of state money into the several school districts," which more than made up the loss suffered by a school district under the limitation of 10 mills in the assessment of *ad valorem* taxes: "The net effect of the 1968 educational financing enactments was not only to make up for the loss of funds suffered by the counties required to reduce local millage but to greatly increase the moneys available to the counties on a per pupil basis." Appellants' Reply Brief 4. Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the judgment and Part II of the opinion.

GROVE PRESS, INC., ET AL. *v.* MARYLAND STATE BOARD OF CENSORS

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

No. 63. Argued November 10, 1970—Decided March 8, 1971

255 Md. 297, 258 A. 2d 240, affirmed by an equally divided Court.

Edward de Grazia argued the cause for appellants. With him on the brief were *Nathan Lewin, Arnold M. Weiner,* and *Alan M. Dershowitz.*

Francis B. Burch, Attorney General of Maryland, argued the cause for appellee. With him on the brief was *Thomas N. Biddison, Jr.,* Assistant Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Felix J. Bilgrey* for the International Film Importers & Distributors of America, Inc.; by *Louis Nizer* for the Motion Picture Association of America, Inc.; by *Leon Friedman* and *Lester Pollack* for the National Association of Theater Owners, Inc., and by *Stanley Fleishman* and *Sam Rosenwein* for the Adult Film Association of America, Inc.

Francis J. Rudolph filed a brief for Morality in Media, Inc., as *amicus curiae,* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

DURHAM *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided March 8, 1971

Not until several months after petitioner had seasonably filed a petition for rehearing from the Court of Appeals' affirmance of his conviction and he had been advised that he would be notified as soon as there was a ruling on that petition, was he informed (on further inquiry) of the court's denial thereof. Within three weeks of receiving that advice, he filed a petition for certiorari, but thereafter he died. *Held:*

1. On the facts of this case, waiver of Rule 22 (2)'s time requirement for filing a petition for certiorari is proper.

2. Death pending direct review, whether by certiorari (as in this case) or appeal, of a federal criminal conviction abates all previous prosecutive proceedings.

Certiorari granted, 419 F. 2d 392; vacated and remanded to the District Court with directions to dismiss the indictment.

PER CURIAM.

Petitioner was convicted of having knowingly possessed a counterfeit $20 bill. After the Court of Appeals for the Ninth Circuit affirmed his conviction he filed this petition for a writ of certiorari. We are now advised that petitioner has died.

It is true that the petition for certiorari is out of time under our Rule 22 (2), though timeliness under our rules, of course, presents no jurisdictional question. Subsequent to the affirmance of his conviction below, petitioner filed a timely petition for rehearing. Upon his inquiry to the Court of Appeals he was informed that he would be notified as to the disposition of his petition as soon as the court acted. When several months passed without any word, petitioner again wrote to that court. In reply, on September 8, 1970, he received a copy of the

order dated March 5, 1970, denying his petition for rehearing. Within three weeks from receipt of the denial from the Court of Appeals his petition for a writ of certiorari was docketed in this Court. On these facts waiver of our Rule 22 is proper.

Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. *Fletcher* v. *Bryan,* 361 U. S. 126. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take whatever action it deemed proper. *Garvin* v. *Cochran,* 371 U. S. 27. Our practice in cases on direct review from state convictions has been to dismiss the proceedings. See *Gersewitz* v. *New York,* 326 U. S. 687. In an earlier case the Court announced the *appeal* had abated, *Johnson* v. *Tennessee,* 214 U. S. 485, while in another the Court stated the *cause* had abated. *List* v. *Pennsylvania,* 131 U. S. 396.

In federal criminal cases we developed the practice of dismissing the writ of certiorari and remanding the cause to the court below. *Singer* v. *United States,* 323 U. S. 338, 346; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 815 n. 11; *United States* v. *Johnson,* 319 U. S. 503, 520 n. 1. We have cited *United States* v. *Pomeroy,* 152 F. 279, rev'd *sub nom. United States* v. *New York Central & H. R. R. Co.,* 164 F. 324, and *United States* v. *Dunne,* 173 F. 254, in suggesting such disposition on remand "as law and justice require," but beyond this we have basically allowed the scope of the abatement to be determined by the lower federal courts.

The status of abatement caused by death on direct review has recently been discussed by the Court of Appeals for the Eighth Circuit in *Crooker* v. *United States,* 325 F. 2d 318. In reviewing the cases that court concluded

that the lower federal courts were unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.* *Id.*, at 320. As stated in *List* v. *Pennsylvania, supra,* on death of the convicted petitioner the "cause has abated."

The unanimity of the lower federal courts which have worked with this problem over the years from *Pomeroy* to *Crooker* is impressive. We believe they have adopted the correct rule. Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment below is vacated and the case is remanded to the District Court with directions to dismiss the indictment.

It is so ordered.

MR. JUSTICE MARSHALL, whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, believes that the case should be disposed of as follows:

The petitioner having died while his petition for certiorari was pending before this Court, we dismiss the petition as moot and direct the Court of Appeals to note this action on its records.

MR. JUSTICE BLACKMUN, dissenting.

This case is here on Durham's petition for certiorari after his appeal to the United States Court of Appeals

*It is suggested that *Crooker* is different because it involved a right of appeal, while here we deal with a petition for a writ of certiorari. It is, of course, true that appeals are a matter of right while decisions on certiorari petitions are wholly discretionary. Congress, however, has given a right to petition for certiorari and petitioner exercised that right. No decision had been made on that petition prior to his death. Since death will prevent any review on the merits, whether the situation is an appeal or certiorari, the distinction between the two would not seem to be important for present purposes.

for the Ninth Circuit resulted in the affirmance of his conviction for a violation of 18 U. S. C. § 474. The Solicitor General now has suggested that the petitioner died on November 20, 1970, while his petition was pending but prior to this Court's taking any action upon it by way of grant or denial.

The petition is untimely. The Ninth Circuit's opinion was filed on November 12, 1969, and rehearing was denied by that court on March 5, 1970. A petition for certiorari to review the judgment of the court of appeals in a criminal case is timely, under our Rule 22(2), only when it is filed here within 30 days after the entry of the judgment or within such additional time, not exceeding 30 days, as is allowed by a Justice of this Court for good cause shown. The petition was filed only on September 26, 1970, and thus is out of time by more than five months.

Further, the situation is not one where the decedent possessed, and had exercised, a right of appeal to this Court, and then died while his appeal was pending. That contrasting and very different situation is the typical one that confronts the federal courts of appeals and with which the Eighth Circuit was concerned in *Crooker* v. *United States*, 325 F. 2d 318 (1963), cited in the Court's *per curiam* opinion.

I would merely dismiss the decedent's petition for certiorari, rather than direct the dismissal of the *indictment*. This disposition seems to me appropriately to reflect the rulings of *American Tobacco Co.* v. *United States*, 328 U. S. 781, 815 n. 11 (1946); *Singer* v. *United States*, 323 U. S. 338, 346 (1945); and *United States* v. *Johnson*, 319 U. S. 503, 520 n. 1 (1943). In contrast, the dismissal of the indictment wipes the slate entirely clean of a federal conviction which was unsuccessfully

appealed throughout the entire appeal process to which the petitioner was entitled as of right.

If, by chance, the suggestion of death has some consequence upon the survivor rights of a third party (a fact not apparent to this Court), the third party so affected is free to make his own timely suggestion of death to the court of appeals.

UNITED MINE WORKERS OF AMERICA *v.* RAILING ET AL., DBA C & P COAL CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 1059. Decided March 22, 1971

Case remanded for further consideration, in light of *Zenith Radio Corp.* v. *Hazeltine Research, ante,* p. 321, of questions involving accrual of causes of action under § 303 of the Labor Management Relations Act and § 4 of the Clayton Act.

Certiorari granted; 429 F. 2d 780, vacated and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals for further consideration in light of *Zenith Radio Corp.* v. *Hazeltine Research, Inc., ante,* p. 321. Both § 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, 29 U. S. C. § 187, and § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15, give a cause of action for injury to business or property. Whether suits under the two statutes are distinguishable for purposes of determining the time at which a cause of action accrues warrants further exploration by the Court of Appeals. Further attention should also be given to the question of why a § 303 cause of action has sufficiently accrued to bring suit as soon as the plaintiff suffers damage but has not sufficiently accrued to start the running of the statute of limitations on the damages already suffered and for which suit may be but is not brought.

THE CHIEF JUSTICE and MR. JUSTICE HARLAN would grant the petition for a writ of certiorari and set the case for argument on the merits.

SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5481. Argued February 22, 1971—Decided March 23, 1971

The District Court for the District of Arizona did not have jurisdiction to entertain a habeas corpus application by an Air Force enlisted man in Arizona on temporary duty orders, as no custodian, neither the commanding officer at Moody Air Force Base in Georgia nor anyone in the chain of command, was a resident of Arizona. Pp. 488–492.

Affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., concurred in the result. STEWART, J., dissented.

Herbert P. Schlanger, petitioner, argued the cause and filed a brief *pro se.*

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Gray, Morton Hollander,* and *Robert E. Kopp.*

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The sole question in this case is whether the District Court for the District of Arizona had jurisdiction to entertain on the merits petitioner's application for a writ of habeas corpus. He is an enlisted man who was accepted in the Airman's Education and Commissioning Program, an officer training project, and was assigned to

Wright-Patterson Air Force Base (AFB), Ohio, "with duty at Arizona State University" for training. While studying in Arizona and before completion of the course, he was removed from the program, allegedly for engaging in civil rights activities on the campus.

While he was seeking administrative relief through command channels, he was reassigned to Moody AFB, Georgia, to complete the remainder of his six-year reenlistment in a noncommissioned status. After exhausting those remedies he was given permissive temporary duty to attend Arizona State for study, this time by his superiors at Moody AFB under a different program called Operation Bootstrap, and at his own expense.[1]

Thereafter [2] he filed his application for habeas corpus in Arizona alleging that his enlistment contract had been breached and that he was being detained unlawfully. The District Court denied the application. The Court of Appeals affirmed on the basis of *Jarrett* v. *Resor*, 426 F. 2d 213. The case is here on a petition for certiorari which we granted. 400 U. S. 865.

The respondents to this suit are the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AF ROTC program on the Arizona State campus. The last respondent was the only one of the

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[1] Headquarters at Moody AFB assigned petitioner to temporary duty at Arizona State University. By its terms, the order "permitted [petitioner] to proceed from Moody AFB, GA. to Arizona State University, Tempe, AZ, effective on or about 4 June 1969 for approximately 70 days for the purpose of attending the University under Operation Bootstrap and then return to Moody AFB, GA." The travel authorized was to be "at no expense to the Government."

Petitioner attended Arizona State in the summer of 1969 and obtained his degree.

[2] This action was started shortly after petitioner had obtained his degree at Arizona State and while he was still in Arizona.

three present in Arizona and he had no control over petitioner who concededly was not in his chain of command, since petitioner was not in the AF ROTC program, but in Operation Bootstrap. The commanding officer at Moody AFB in Georgia did have custody and control over petitioner; but he was neither a resident of the Arizona judicial district nor amenable to its process.

It is true, of course, that the commanding officer at Moody AFB exerted control over petitioner in the sense that his arm was long and petitioner was effectively subject to his orders and directions. There are cases which suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from a point located outside the State, as long as the petitioner is in the district or the State. *Donigian* v. *Laird,* 308 F. Supp. 449. For reasons to be stated, we do not reach that question.

The procedure governing issuance of the writ is provided by statute. The federal courts may grant the writ "within their respective jurisdictions." 28 U. S. C. § 2241 (a). While the Act speaks of "a prisoner" (28 U. S. C. § 2241 (c)), the term has been liberally construed to include members of the armed services who have been unlawfully detained, restrained, or confined. *Eagles* v. *Samuels,* 329 U. S. 304, 312. The Act extends to those "in custody under or by color of the authority of the United States." 28 U. S. C. § 2241 (c)(1). The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court.

In *Ahrens* v. *Clark,* 335 U. S. 188, we held that it was not sufficient if the custodian alone be found in the jurisdiction where the persons detained were outside the juris-

diction [3] and that jurisdiction over the respondent was territorial.[4] The dissent in that case thought that the critical element was not where the applicant was confined but where the custodian was located; that if the custodian were in the territorial jurisdiction of the District Court, then appropriate relief could be effected.

Whichever view is taken of the problem in *Ahrens* v. *Clark*, the case is of little help here. For while petitioner is within the territorial jurisdiction of the District Court, the custodian—the Commander of Moody AFB—

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[3] Shortly thereafter Congress provided that a prisoner, no matter where held, could *by motion* invoke the jurisdiction of the sentencing court and be released on a showing that the sentence was unlawful. 28 U. S. C. § 2255. See *United States* v. *Hayman*, 342 U. S. 205, 220; *Kaufman* v. *United States*, 394 U. S. 217.

Later Congress made an exception to the jurisdictional requirement noted in *Ahrens* by allowing a state prisoner to seek habeas corpus in the district where he was sentenced, as well as in the district where he is confined, provided both are within the same State. 28 U. S. C. § 2241 (d) (1964 ed., Supp. V). As respects that amendment the Court said in *Nelson* v. *George*, 399 U. S. 224, 228 n. 5:

"The legislative history of the 1966 amendments to 28 U. S. C. § 2241 (d) (1964 ed., Supp. V) suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by those amendments. See H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1–2 (1966). See also S. Rep. No. 1502, 89th Cong., 2d Sess. (1966)."

[4] Although by 28 U. S. C. § 1391 (e) (1964 ed., Supp. V), Congress has provided for nationwide service of process in a "civil action in which each defendant is an officer or employee of the United States," the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia. See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2. Though habeas corpus is technically "civil," it is not automatically subject to all the rules governing ordinary civil actions. See *Harris* v. *Nelson*, 394 U. S. 286.

is not. In other words, even under the minority view in *Ahrens* v. *Clark*, the District Court in Arizona has no custodian within its reach against whom its writ can run. Hence, even if we assume that petitioner is "in custody" [5] in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement (*Jones* v. *Cunningham*, 371 U. S. 236, 240), the absence of his custodian is fatal to the jurisdiction of the Arizona District Court. Cf. *Rudick* v. *Laird*, 412 F. 2d 16, 21.

Had petitioner, at the time of the filing of the petition, been under the command of the Air Force officer assigned

[5] The concept of "custody" has been an evolving one as Judge Northrop shows in *Donigian* v. *Laird*, 308 F. Supp. 449, 451. And see *Peyton* v. *Rowe*, 391 U. S. 54, 64–66. In *Jones* v. *Cunningham*, 371 U. S. 236, 238, 240, 243, we said:

"While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. . . .

. . . . . .

"History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus. . . .

. . . . . .

"It [the Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents."

as liaison officer at Arizona State to supervise the Education and Commissioning Program, we would have a different question. We do not reach it nor do we reach any aspects of the merits, *viz.*, whether, if petitioner be right in contending that his contract of enlistment was breached, habeas corpus is the appropriate remedy.

Affirmed.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE STEWART dissents.

Syllabus

OHIO *v.* WYANDOTTE CHEMICALS CORP. ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 41, Orig. Argued January 18, 1971—Decided March 23, 1971

The State of Ohio filed a motion for leave to file a bill of complaint invoking the Court's original jurisdiction against defendant companies, incorporated in Michigan, Delaware, and Canada, to abate an alleged nuisance resulting in the contamination and pollution of Lake Erie from the dumping of mercury into its tributaries. The Court declines to exercise its jurisdiction in this case since the issues are bottomed on local law that the Ohio courts are competent to consider; several national and international bodies are actively concerned with the pollution problems involved here; and the nature of the case requires the resolution of complex, novel, and technical factual questions that do not implicate important problems of federal law, which are the primary responsibility of the Court. Pp. 495–505.

Denied.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 505.

Paul W. Brown, Attorney General of Ohio, argued the cause and filed a brief for plaintiff.

John M. Moelmann argued the cause for defendant Wyandotte Chemicals Corp. With him on the briefs were *Thomas J. Weithers* and *Milton F. Mallender*. *Ian W. Outerbridge*, by special leave of Court, argued the cause for defendant Dow Chemical Co. of Canada, Ltd. With him on the briefs was *Richard W. Galiher*. *Harley J. McNeal* argued the cause and filed briefs for defendant Dow Chemical Co.

Peter L. Strauss argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor*

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General Griswold, Assistant Attorney General Kashiwa, and *James R. Moore.*

Frank J. Kelley, Attorney General, *Robert E. Derengoski,* Solicitor General, and *M. Robert Carr,* Assistant Attorney General, filed a brief for the State of Michigan as *amicus curiae.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

By motion for leave to file a bill of complaint, Ohio seeks to invoke this Court's original jurisdiction. Because of the importance and unusual character of the issues tendered we set the matter for oral argument, inviting the Solicitor General to participate and to file a brief on behalf of the United States, as *amicus curiae.* For reasons that follow we deny the motion for leave to file.

The action, for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corp. (Wyandotte), Dow Chemical Co. (Dow America), and Dow Chemical Company of Canada, Ltd. (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

The complaint alleges that Dow Canada and Wyandotte have each dumped mercury into streams whose courses ultimately reach Lake Erie, thus contaminating and polluting that lake's waters, vegetation, fish, and wildlife, and that Dow America is jointly responsible for the acts of its foreign subsidiary. Assuming the State's

ability to prove these assertions, Ohio seeks a decree: (1) declaring the introduction of mercury into Lake Erie's tributaries a public nuisance; (2) perpetually enjoining these defendants from introducing mercury into Lake Erie or its tributaries; (3) requiring defendants either to remove the mercury from Lake Erie or to pay the costs of its removal into a fund to be administered by Ohio and used only for that purpose; (4) directing defendants to pay Ohio monetary damages for the harm done to Lake Erie, its fish, wildlife, and vegetation, and the citizens and inhabitants of Ohio.

Original jurisdiction is said to be conferred on this Court by Art. III of the Federal Constitution. Section 2, cl. 1, of that Article, provides: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens or Subjects." Section 2, cl. 2, provides: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." Finally, 28 U. S. C. § 1251 (b) provides: "The Supreme Court shall have original but not exclusive jurisdiction of . . . (3) All actions or proceedings by a State against the citizens of another State or against aliens."

While we consider that Ohio's complaint does state a cause of action that falls within the compass of our original jurisdiction, we have concluded that this Court should nevertheless decline to exercise that jurisdiction.

I

That we have jurisdiction seems clear enough.[1] Beyond doubt, the complaint on its face reveals the existence of a

[1] The matter is well treated in the Solicitor General's *amicus* brief, which satisfactorily deals with a number of considerations which we find it unnecessary to discuss in this opinion.

genuine "case or controversy" between one State and citizens of another, as well as a foreign subject. Diversity of citizenship is absolute. Nor is the nature of the cause of action asserted a bar to the exercise of our jurisdiction. While we have refused to entertain, for example, original actions designed to exact compliance with a State's penal laws, *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265 (1888), or that seek to embroil this tribunal in "political questions," *Mississippi* v. *Johnson*, 4 Wall. 475 (1867); *Georgia* v. *Stanton*, 6 Wall. 50 (1868), this Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another. See *Missouri* v. *Illinois*, 180 U. S. 208 (1901) (complaint filed), 200 U. S. 496 (1906) (final judgment); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *New York* v. *New Jersey*, 256 U. S. 296 (1921); *New Jersey* v. *New York City*, 283 U. S. 473 (1931). In short, precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute in the first instance.[2]

Ordinarily, the foregoing would suffice to settle the issue presently under consideration: whether Ohio should be granted leave to file its complaint. For it is a time-

[2] While we possess jurisdiction over Dow America and Wyandotte simply on the basis of their citizenship, the problem with respect to Dow Canada is quite different with regard to two major issues: whether that foreign corporation has "contacts" of the proper sort sufficient to bring it personally before us, and whether service of process can lawfully be made upon Dow Canada. Were we to decide to entertain this complaint, however, it seems reasonably clear that the better course would be to reserve this aspect of the jurisdictional issue pending ascertainment of additional facts, rather than to resolve it now. Thus, for purposes of ruling on Ohio's motion for leave to file its complaint, we treat the question of jurisdiction over all three defendants as a unitary one.

honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it. *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821). Nevertheless, although it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.

As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies. The simultaneous development of "long-arm jurisdiction" means, in most instances, that no necessity impels us to perform such a role. And the evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim

to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.

This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

Thus, we think it apparent that we must recognize "the need [for] the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Massachusetts* v. *Missouri*, 308 U. S. 1, 19 (1939), opinion of Chief Justice Hughes. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 464–465 (1945), and *id.*, at 469–471 (dissenting opinion).[3] We believe, however, that

[3] In our view the federal statute, 28 U. S. C. § 1251 (b) (3), providing that our original jurisdiction in cases such as these is merely concurrent with that of the federal district courts, reflects this same judgment. However, this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on those courts, see C. Wright, Federal Courts 502 (2d ed. 1970), and no other statutory jurisdictional basis exists. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U. S. C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U. S. C. § 1331. So far as it

the focus of concern embodied in the above-quoted statement of Chief Justice Hughes should be somewhat refined. In our opinion, we may properly exercise such discretion, not simply to shield this Court from noisome, vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system. Protecting this Court *per se* is at best a secondary consideration. What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court. A broader view of the scope and purposes of our discretion would inadequately take account of the general duty of courts to exercise that jurisdiction they possess.

Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.

II

In applying this analysis to the facts here presented, we believe that the wiser course is to deny Ohio's motion for leave to file its complaint.

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appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

A

Two principles seem primarily to have underlain conferring upon this Court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisholm* v. *Georgia*, 2 Dall. 419, 475–476 (1793); *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S., at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.

Neither of these policies is, we think, implicated in this lawsuit. The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. In essence, the State has charged Dow Canada and Wyandotte with the commission of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true. See, *e. g.*, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945);

United States v. *Aluminum Co. of America,* 148 F. 2d 416 (CA2 1945); ALI, Restatement of the Foreign Relations Law of the United States 2d, § 18. And while we cannot speak for Canadian courts, we have been given no reason to believe they would be less receptive to enforcing a decree rendered by Ohio courts than one issued by this Court. Thus, we do not believe exercising our discretion to refuse to entertain this complaint would undermine any of the purposes for which Ohio was given the authority to bring it here.

B

Our reasons for thinking that, as a practical matter, it would be inappropriate for this Court to attempt to adjudicate the issues Ohio seeks to present are several. History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. In *Missouri* v. *Illinois,* 200 U. S. 496, 520–522 (1906), Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies. The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof and the Court with the duty of applying only legal principles "which [it] is prepared deliberately to maintain against all considerations on the other side," *id.,* at 521, an accommodation which, in cases of this kind, the Court has found necessary to maintain ever since.[4] See, *e. g., New*

[4] Justice Holmes' analysis appears to rest, in part, on the fact that in the case before him the conduct complained of was the act of a sovereign State. However, we see no reason why the determination to impose a high standard of proof would not be equally compelling in a case such as the one before us. Arguably, the necessity for applying virtually unexceptionable legal principles does not obtain where conduct never previously subjected to state law scrutiny is involved, but this is not the case here. See text, *infra.*

York v. *New Jersey*, 256 U. S., at 309. Justice Clarke's closing plea in *New York* v. *New Jersey*, *id.*, at 313, strikingly illustrates the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand:

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

The difficulties that ordinarily beset such cases are severely compounded by the particular setting in which this controversy has reached us. For example, the parties have informed us, without contradiction, that a number of official bodies are already actively involved in regulating the conduct complained of here. A Michigan circuit court has enjoined Wyandotte from operating its mercury cell process without judicial authorization. The company is, moreover, currently utilizing a recycling process specifically approved by the Michigan Water Resources Commission and remains subject to the continued scrutiny of that agency. Dow Canada reports monthly to the Ontario Water Resources Commission on its compliance with the commission's order prohibiting the company from passing any mercury into the environment.

Additionally, Ohio and Michigan are both participants in the Lake Erie Enforcement Conference, convened a year ago by the Secretary of the Interior pursuant to the Federal Water Pollution Control Act, 62 Stat. 1155,

as amended. The Conference is studying all forms and sources of pollution, including mercury, infecting Lake Erie. The purpose of this Conference is to provide a basis for concerted remedial action by the States or, if progress in that regard is not rapidly made, for corrective proceedings initiated by the Federal Government. 33 U. S. C. § 466g (1964 ed. and Supp. V). And the International Joint Commission, established by the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, issued on January 14, 1971, a comprehensive report, the culmination of a six-year study carried out at the request of the contracting parties, concerning the contamination of Lake Erie. That document makes specific recommendations for joint programs to abate these environmental hazards and recommends that the IJC be given authority to supervise and coordinate this effort.

In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis.

The nature of the case Ohio brings here is equally disconcerting. It can fairly be said that what is in dispute is not so much the law as the facts. And the factfinding process we are asked to undertake is, to say the least, formidable. We already know, just from what has been placed before us on this motion, that Lake Erie suffers from several sources of pollution other than mercury; that the scientific conclusion that mercury is a serious water pollutant is a novel one; that whether and to what extent the existence of mercury in natural waters can safely or reasonably be tolerated is a question for which there is presently no firm answer; and that virtually no published research is available describing

how one might extract mercury that is in fact contaminating water. Indeed, Ohio is raising factual questions that are essentially ones of first impression to the scientists. The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic. Nor would it suffice to impose on Ohio an unusually high standard of proof. That might serve to mitigate our personal difficulties in seeking a just result that comports with sound judicial administration, but would not lessen the complexity of the task of preparing responsibly to exercise our judgment, or the serious drain on the resources of this Court it would entail. Other factual complexities abound. For example, the Department of the Interior has stated that eight American companies are discharging, or have discharged, mercury into Lake Erie or its tributaries. We would, then, need to assess the business practices and relative culpability of each to frame appropriate relief as to the one now before us.

Finally, in what has been said it is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court. Thus, entertaining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters.

To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of

fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.

III

What has been said here cannot, of course, be taken as denigrating in the slightest the public importance of the underlying problem Ohio would have us tackle. Reversing the increasing contamination of our environment is manifestly a matter of fundamental import and utmost urgency. What is dealt with above are only considerations respecting the appropriate role this Court can assume in efforts to eradicate such environmental blights. We mean only to suggest that our competence is necessarily limited, not that our concern should be kept within narrow bounds.

Ohio's motion for leave to file its complaint is denied without prejudice to its right to commence other appropriate judicial proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is

to abate a public nuisance. Such was the claim of Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. The Court said:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." *Id.*, at 238.

Dumping of sewage in an interstate stream, *Missouri* v. *Illinois*, 200 U. S. 496, or towing garbage to sea only to have the tides carry it to a State's beaches, *New Jersey* v. *New York City*, 283 U. S. 473, have presented analogous situations which the Court has entertained in suits invoking our original jurisdiction. The pollution of Lake Erie or its tributaries by the discharge of mercury or compounds thereof, if proved, certainly creates a public nuisance of a seriousness and magnitude which a State by our historic standards may prosecute or pursue as *parens patriae*.

The suit is not precluded by the Boundary Waters Treaty of 1909, 36 Stat. 2448. Article IV provides that the "boundary waters . . . shall not be polluted on either side to the injury of health or property on the other." But there is no machinery for direct enforcement of Art. IV.

Article VIII empowers the International Joint Commission to "pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV . . . the approval of this Commission is required." Those Articles specifically describe the type of projects for which approval is required. For

example, Art. IV states that the "[p]arties . . . will not permit the construction or maintenance . . . of any remedial or protective works or any dams or other obstructions . . . the effect of which is to raise the natural level of waters on the other side of the boundary unless . . . approved by the . . . Commission." Significantly, the proscription of pollution, which immediately follows this provision in Art. IV, does not mention approval or action by the International Joint Commission.

Article X does vest the Commission with power to render binding decisions on matters referred by consent of both parties. But Art. X states that any joint reference "on the part of the United States . . . will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council."

In other words, so far as pollution is concerned, the Treaty contains no provision for binding arbitration. Thus, it does not evince a purpose on the part of the national governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution. Indeed, Congress in later addressing itself to water pollution in the Federal Water Pollution Control Act, 33 U. S. C. § 1151 (1970 ed.), said in § 1 (c):

> "Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (*including boundary waters*) of such States." (Emphasis added.)

This litigation, as it unfolds, will, of course, implicate much federal law. The case will deal with an important portion of the federal domain—the navigable streams and the navigable inland waters which are under the sovereignty of the Federal Government. It has been clear

since *Pollard's Lessee* v. *Hagan*, 3 How. 212, decided in 1845, that navigable waters were subject to federal control. That paramount federal dominion extends into the oceans beyond low tide. *United States* v. *California*, 332 U. S. 19.

Congress has enacted numerous laws reaching that domain. One of the most pervasive is the Rivers and Harbors Act of 1899, 30 Stat. 1121, as amended, 33 U. S. C. § 403, which was before us in *United States* v. *Republic Steel Corp.*, 362 U. S. 482. In that case we read § 13 of the 1899 Act, 33 U. S. C. § 407, which forbids discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" as including particles in suspension. *Id.*, at 490.

In the 1930's fish and wildlife legislation was enacted granting the Secretary of the Interior various heads of jurisdiction over the effects on fish and wildlife of "domestic sewage, mine, petroleum, and industrial wastes, erosion silt, and other polluting substances." See, *e. g.*, 16 U. S. C. § 665. Among other things, the Secretary of the Interior through the Fish and Wildlife Service gave advice to the Corps of Engineers as respects the effects which proposed dredging or filling of estuaries would have on fish or wildlife.[1]

Since that time other changes have been made in the design of the federal system of water control. The Federal Water Pollution Control Act, as amended, 33 U. S. C. § 1151 (1970 ed.), gives broad powers to the Secretary to take action respecting water pollution on complaints of States, and other procedures to secure federal abatement of the pollution. *Ibid.* The National

[1] See Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, Serial No. 90–3, p. 32 *et seq.*

Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4331 (1964 ed., Supp. V), gives elaborate ecological directions to federal agencies and supplies procedures for their enforcement.

On December 23, 1970, the President issued an Executive Order [2] which correlates the duties of the Corps of Engineers and the Administrator of the new Environmental Protection Agency under the foregoing statutes. Under that Executive Order the Corps in order "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries" is directed after consultation with the Administrator to amend its regulations concerning issuance of permits. While the Corps is responsible for granting or denying permits, § 2 (a)(2), it *must* accept the findings of the Administrator respecting "water quality standards," § 2(a)(2)(A). On December 31, 1970, the Corps gave notice of its new proposed rules to govern discharges or deposits into navigable waters.[3]

Yet the federal scheme is not pre-emptive of state action. Section 1 (b) of the Water Pollution Control Act declares that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." 33 U. S. C. § 1151 (b) (1970 ed.). Section 10 provides that except where the Attorney General has actually obtained a court order of pollution abatement on behalf of the United States, "State and interstate action to abate pollution of . . . navigable waters . . . shall not . . . be displaced by Federal enforcement action." § 10 (b), 33 U. S. C. § 1160 (b) (1970 ed.).

The new Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U. S. C. § 4371 (1970 ed.),

[2] Exec. Order No. 11574, 35 Fed. Reg. 19627.

[3] 35 Fed. Reg. 20005. And see 36 Fed. Reg. 983 concerning its proposed policy, practice, and procedure in that regard.

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while stating the general policy of Congress in protecting the environment, also states: "The primary responsibility for implementing this policy rests with State and local governments." 42 U. S. C. § 4371 (b)(2) (1970 ed.).

There is much complaint that in spite of the arsenal of federal power little is being done.[4] That, of course, is not our problem. But it is our concern that state action is not pre-empted by federal law. Under existing federal law, the States do indeed have primary responsibility for setting water quality standards; the federal agency only sets water quality standards for a State if the State defaults. 33 U. S. C. § 1160 (c) (1970 ed.).

There is not a word in federal law that bars state action. If, however, defendants had a permit from the Corps to discharge mercury into federal waters, the question would be vastly different. But they do not, and so far as appears they are not under any federal process and are not parties to any federal proceedings. In light of the history of water pollution control efforts in this country it cannot be denied that a vast residual authority rests in the States. And there is no better established remedy in state law than authority to abate a nuisance.[5]

Much is made of the burdens and perplexities of these original actions. Some are complex, notably those involving water rights.

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[4] See Polikoff, The Interlake Affair, Wash. Monthly, Vol. 3, No. 1, p. 7 (Mar. 1971).

[5] 2 W. Blackstone, Commentaries *218 (Cooley 4th ed. 1899): "[I]t is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dyehouse or a lime-pit for the use of trade, in the upper part of the stream; or in short to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of 'doing to others as we would they should do unto ourselves.'"

The drainage of Lake Michigan with the attendant lowering of water levels, affecting Canadian as well as United States interests, came to us in an original suit in which the Hon. Charles E. Hughes was Special Master. This Court entered a decree, *Wisconsin* v. *Illinois*, 278 U. S. 367, and has since that time entered supplementary decrees.[6]

The apportionment of the waters of the Colorado between Arizona and California was a massive undertaking entailing a searching analysis by the Special Master, the Hon. Simon H. Rifkind. Our decision was based on the record made by him and on exceptions to his Report. *Arizona* v. *California*, 373 U. S. 546.

The apportionment of the waters of the North Platte River among Colorado, Wyoming, and Nebraska came to us in an original action in which we named as Special Master, Hon. Michael J. Doherty. We entered a complicated decree, which dissenters viewed with alarm, *Nebraska* v. *Wyoming*, 325 U. S. 589, but which has not demanded even an hour of the Court's time during the 26 years since it was entered.

If in these original actions we sat with a jury, as the Court once did,[7] there would be powerful arguments for abstention in many cases. But the practice has been to appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisers. The problems in this case are simple compared with those in the water cases discussed above. It is now known that metallic mercury deposited in water is often transformed into a dangerous chemical. This lawsuit would determine primarily the extent, if any, to which the defendants are contributing to that contamination at the present

[6] 281 U. S. 179, 696; 289 U. S. 395; 309 U. S. 569; 311 U. S. 107; 313 U. S. 547; 388 U. S. 426.

[7] *Georgia* v. *Brailsford*, 3 Dall. 1.

time. It would determine, secondarily, the remedies within reach—the importance of mercury in the particular manufacturing processes, the alternative processes available, the need for a remedy against a specified polluter as contrasted to a basin-wide regulation, and the like.

The problem, though clothed in chemical secrecies, can be exposed by the experts. It would indeed be one of the simplest problems yet posed in the category of cases under the head of our original jurisdiction.

The Department of Justice in a detailed brief tells us there are no barriers in federal law to our assumption of jurisdiction.[8] I can think of no case of more transcending public importance than this one.

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[8] The case is therefore not an appropriate one for application of the teaching of *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486, that "[w]hile the State, under some circumstances, may sue (as *parens patriae*) for the protection of its citizens (*Missouri* v. *Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

Syllabus

UNITED STATES *v.* RANDALL, TRUSTEE IN BANKRUPTCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 125. Argued February 22, 1971—
Decided March 24, 1971

The debtor corporation, kept in possession of its business by court order under Chapter XI of the Bankruptcy Act, did not comply with requirements that it deposit withheld taxes in a special tax account. It was later adjudicated a bankrupt, and the United States asked the bankruptcy court to pay the amount of withheld taxes prior to payment of costs and expenses of the bankruptcy proceedings, pursuant to 26 U. S. C. § 7501 (a), which provides that the amount of withheld taxes "shall be held to be a special fund in trust for the United States." The referee denied the request, and the District Court and the Court of Appeals agreed. *Held:* Section 64 (a) (1) of the Bankruptcy Act, which is an overriding statement of federal policy on the question of priorities, clearly provides that the first priority in payments from bankrupt estates belongs to the costs and expenses of administration incurred in the bankruptcy proceedings. Pp. 515–517.

419 F. 2d 1068, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which HARLAN, BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACK and STEWART, JJ., joined, *post*, p. 518.

Richard B. Stone argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett.*

Kevin J. Gillogly argued the cause for respondent. With him on the brief was *Daniel C. Ahern.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Halo Metal Products, Inc. (the debtor) was kept in possession of its business by court order under Chapter XI of the Bankruptcy Act, 11 U. S. C. § 701 *et seq.* The order required it to open three separate bank accounts for its general, payroll, and tax indebtedness and to make appropriate disbursements from those accounts. Salaries and wages paid were to be credited against the payroll account and checks for wages and for withheld income and social security taxes were to be paid after approval by the referee. Checks for the withheld taxes were to be paid into the tax account. Withdrawals from this account were to be allowed only for payment of withheld taxes and welfare obligations.

The debtor did not comply with those requirements. Although it withheld income and social security taxes from the wages of its employees, it did not deposit them in the special tax account and did not pay them, as required, to the United States.

Later the debtor was adjudicated a bankrupt. The United States, which had previously filed a proof of claim in the Chapter XI proceedings for payment of the taxes, now asked the bankruptcy court to pay the amount of withheld taxes prior to the payment of the costs and expenses of administration of the bankruptcy proceedings. The referee denied the request. The District Court agreed with the referee. The Court of Appeals affirmed the order denying payment, 419 F. 2d 1068. The case is here on petition for a writ of certiorari which we granted (400 U. S. 817) because of a conflict among the circuits, cf. *City of New York* v. *Rassner*, 127 F. 2d 703; *United States* v. *Sampsell*, 193 F. 2d 154; *Hercules Service Parts Corp.* v. *United States*, 202 F. 2d 938.

The United States relies for its priority on 26 U. S. C. § 7501 (a), which provides:

> "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

The argument is that withheld taxes are a trust in favor of the United States. It is answered that the debtor-in-possession failed to segregate the taxes so withheld; hence there was no trust. To that the United States replies that since the debtor-in-possession was a court-appointed officer, the misconduct of the officer should not defeat the trust.[1] And, the argument continues, creditors are not unfairly harmed since the trust funds were never an asset of the estate.

We deal, however, with a Bankruptcy Act which we conclude is an overriding statement of federal policy on this question of priorities. Section 64 (a)(1) of the Act, 11 U. S. C. § 104 (a)(1) (1964 ed., Supp. V), provides:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration . . . . Where an order is entered in a pro-

[1] "Where the funds are received by a public officer, such as a receiver or trustee in bankruptcy, the owner of the funds is entitled to priority with respect to the funds so received without further tracing." 5 A. Scott on Trusts § 521, p. 3652 (3d ed. 1967).

> ceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding . . . shall have priority in advance of payment of the unpaid costs and expenses of administration . . . incurred in the superseded proceeding . . . ."

Until 1926 claims for administrative expenses were subordinate to tax claims.[2] In that year they were placed ahead of taxes.[3] The costs and administrative expenses of a trustee were, however, still subordinate to claims of the referee or creditors for preserving or recovering assets.[4] In 1952 the Act was amended to give priority to administrative expenses of an ensuing bankruptcy proceeding over unpaid administrative expenses of a superseded proceeding.[5]

We have then a progressive legislative development that (1) marks a decline in the grant of a tax preference to the United States and (2) marks an ascending priority for costs and expenses of administration.

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[2] 3A Collier on Bankruptcy 2046–2048, 2155–2156 (14th ed. 1969).

[3] 44 Stat. 662.

[4] Collier, *supra*, n. 2, at 2049, 2050 n. 15.

[5] 66 Stat. 426. "Unless provision is made for payment of the costs and expenses necessary to liquidate, administer and close the estate in the ensuing bankruptcy proceeding, ahead of all prior incurred and unpaid administration costs and expenses, there is always danger of a breakdown of administration. There should be assurance to the trustee in the ensuing proceeding that the costs and expenses incurred by him, such as bond and insurance premiums, costs of conducting a public sale and compensation for his services and for the services of his attorney, will be paid out of the assets liquidated and administered by him ahead of the prior unpaid costs and expenses." S. Rep. No. 1395, 82d Cong., 2d Sess., 5.

In 1966 Congress amended § 17 of the Act so as to make dischargeable all taxes due and owing more than three years prior to bankruptcy except, *inter alia*, those withheld or collected from others but not paid over. Act of July 5, 1966, 80 Stat. 270.

We think the statutory policy of subordinating taxes to costs and expenses of administration would not be served by creating or enforcing trusts which eat up an estate, leaving little or nothing for creditors and court officers whose goods and services created the assets. In *Nicholas* v. *United States*, 384 U. S. 678, 690–692, we rejected the claim of the United States that under § 7501 (a) of the Internal Revenue Code it was entitled to interest accruing after the arrangement under Chapter XI and during the bankruptcy. We so held because to allow interest would run counter to the "strong policy of § 64 (a)(1) of the Bankruptcy Act." *Id.*, at 691. To allow the present claimed priority for the principal would by the same token run counter to the grain of the Bankruptcy Act.

This construction conforms with a literal reading of the second sentence of § 7501 (a) which makes the amount of such fund payable "in the same manner and subject to the same provisions and limitations . . . as are applicable with respect to the taxes from which such fund arose." In conformity with *Nicholas* we read those words against the history of the Bankruptcy Act. So read, the fund is as subordinate as the taxes. See *In re Green*, 264 F. Supp. 849, 851.

What we decide today is also in accord with those decisions which hold that the specific priorities granted by Congress in the Bankruptcy Act govern generalized statutes giving the United States priority in a wide range of situations.[6] *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152; *Davis* v. *Pringle*, 268 U. S. 315.

Affirmed.

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[6] The competing Act in those cases was Rev. Stat. § 3466, which read: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all

MR. JUSTICE BLACKMUN, whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE STEWART join, dissenting.

I cannot escape the conviction that the Court's ruling on this very narrow issue dishonors property of the United States and effects a windfall for those who benefit from the ruling.

The amount in issue consists of income and FICA taxes actually withheld from wages of employees. These are not taxes of the debtor. Were it not for the withholding scheme, the amounts would have been paid out to the employees as gross wages and it would have been their obligation, as it was prior to the adoption of withholding, to pay those taxes. Instead, the employer now withholds, and § 7501 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 7501 (a), appropriately impresses a trust upon the amounts withheld. The Court today defeats the trust only because the arrangement debtor in possession, a corporation which the Court has characterized as "an officer of the bankruptcy court," *Nicholas* v. *United States*, 384 U. S. 678, 690 (1966), flagrantly disobeyed the arrangement court's specific order to pay the withholding amounts into a separate bank account. The respondent trustee concedes that if the order had been obeyed, the trustee would have no case. Tr. of Oral Arg. 34.

The decision in *Nicholas* does not demand the result reached by the Court. That case concerned interest accruing during bankruptcy, not the tax on which the in-

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the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

terest was asserted. The present decision is a long step down the road beyond *Nicholas*.

Neither am I persuaded by the suggestion made by the trustee, and seemingly reflected in the Court's opinion, that a contrary decision would leave little or nothing for administrative costs of the bankruptcy proceeding and therefore would deter orderly administration of bankrupt estates. I suspect that the fact of bankruptcy administration of a vast number of small- or no-asset cases is a sufficient refutation of that suggestion.

I find myself in accord with the views expressed by the Second, Sixth, and Ninth Circuits. *City of New York* v. *Rassner*, 127 F. 2d 703 (CA2 1942); *In re Airline-Arista Printing Corp.*, 267 F. 2d 333 (CA2 1959), aff'g 156 F. Supp. 403 (SDNY 1957); *Hercules Service Parts Corp.* v. *United States*, 202 F. 2d 938 (CA6 1953); *United States* v. *Sampsell*, 193 F. 2d 154 (CA9 1951). I would reverse.

UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 87. Argued March 2, 1971—Decided March 24, 1971

This case arises from the attempted joinder pursuant to 43 U. S. C. § 666 of the United States as a defendant in a proceeding in state court for the adjudication of water rights covering the Eagle River system in Colorado. Under § 666 (a) "[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States [owns] or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise . . . ." The United States contended that § 666 applies only to water rights that it had acquired under state law and does not constitute consent to have adjudicated in a state court the Government's reserved water rights arising from withdrawals of land from the public domain. Its objection was overruled by the trial court and the Colorado Supreme Court denied the Government's motion for a writ of prohibition. *Held:* Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within a particular State's jurisdiction regardless of how they were acquired. Any conflict between adjudicated rights and reserved rights of the United States, if preserved in the state proceeding, can ultimately be reviewed in this Court. Pp. 522–526.

169 Colo. 555, 458 P. 2d 760, affirmed.

MR. JUSTICE DOUGLAS delivered the opinion for a unanimous Court. MR. JUSTICE HARLAN, though joining in the opinion, filed a concurring statement, *post*, p. 530.

Deputy Assistant Attorney General Kiechel argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Francis X. Beytagh, Jr., Edmund B. Clark,* and *Charles N. Woodruff.*

Kenneth Balcomb argued the cause for respondents. With him on the brief were *Robert L. McCarty, George L. Zoellner, Don H. Sherwood,* and *Raphael J. Moses.*

Briefs of *amici curiae* were filed by *Gary K. Nelson,* Attorney General, and *Irving A. Jennings* for the State of Arizona et al.; by *Thomas C. Lynch,* Attorney General, *Walter S. Rountree,* Assistant Attorney General, and *David B. Stanton,* Deputy Attorney General, for the State of California; by *Duke W. Dunbar,* Attorney General of Colorado, *Lee Johnson,* Attorney General of Oregon, *Harvey Dickerson,* Attorney General of Nevada, *Robert M. Robson,* Attorney General of Idaho, *Robert L. Woodahl,* Attorney General of Montana, and *G. Kent Edwards,* Attorney General of Alaska, for the States of Colorado et al.; by *G. T. Blankenship,* Attorney General, and *W. Howard O'Bryan, Jr.,* Assistant Attorney General, for the State of Oklahoma; by *Vernon B. Romney,* Attorney General, *Robert B. Hansen,* Deputy Attorney General, and *Dallin W. Jensen,* Assistant Attorney General, for the State of Utah; by *Slade Gorton,* Attorney General, and *Charles B. Roe, Jr.,* and *Henry W. Ipsen,* Assistant Attorneys General, for the State of Washington; and by *James E. Barrett,* Attorney General, *Sterling A. Case,* Deputy Attorney General, and *Jack R. Gage,* Special Assistant Attorney General, for the State of Wyoming.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Eagle River is a tributary of the Colorado River; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. The present case started in the Colorado courts and is called a supplemental water adjudication under Colo. Rev. Stat. Ann. § 148–9–7 (1963). The Colorado court issued a notice which, *inter alia,* asked all

owners and claimants of water rights in those streams "to file a statement of claim and to appear . . . in regard to all water rights owned or claimed by them." The United States was served with this notice pursuant to 43 U. S. C. § 666.[1] The United States moved to be dismissed as a party, asserting that 43 U. S. C. § 666 does not constitute consent to have adjudicated in a state court the reserved water rights of the United States.

The objections of the United States were overruled by the state District Court and on a motion for a writ of prohibition the Colorado Supreme Court took the same view. 169 Colo. 555, 458 P. 2d 760. The case is here on a petition for certiorari, which we granted. 397 U. S. 1005.

We affirm the Colorado decree.

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona* v. *California*, 373 U. S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of

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[1] 66 Stat. 560, 43 U. S. C. § 666 (a), provides:

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

federally reserved lands." *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona* v. *California* we were primarily concerned with Indian reservations. *Id.*, at 598–601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave. *Id.*, at 600–601. Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876.

The United States points out that Colorado water rights are based on the appropriation system which requires the permanent fixing of rights to the use of water at the time of the adjudication, with no provision for the future needs, as is often required in case of reserved water rights.[2] *Ibid.* Since those rights may potentially be at war with appropriative rights, it is earnestly urged that 43 U. S. C. § 666 gave consent to join the United States only for the adjudication of water rights which the United States acquired pursuant to state law.

The consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source" would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction. With that to one side, the first clause of § 666 (a)(1), read literally, would seem to cover this case for "rights to the use of water of a river system" is broad enough to embrace "reserved" waters.

[2] See *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 446; *Mason* v. *Hills Land & Cattle Co.*, 119 Colo. 404, 204 P. 2d 153.

The main reliance of the United States appears to be on Clause 2 of § 666 (a) which reads:

> ". . . for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise."

This provision does not qualify § 666 (a)(1), for (1) and (2) are separated by an "or." Yet even if "or" be read as "and," we see no difficulty with Colorado's position. Section 666 (a)(2) obviously includes water rights previously acquired by the United States through appropriation or presently in the process of being so acquired. But we do not read § 666 (a)(2) as being restricted to appropriative rights acquired under state law. In the first place "the administration of such rights" in § 666 (a)(2) must refer to the rights described in (1) for they are the only ones which in this context "such" could mean; and as we have seen they are all-inclusive, in terms at least. Moreover, (2) covers rights acquired by appropriation under state law and rights acquired "by purchase" or "by exchange," which we assume would normally be appropriative rights. But it also includes water rights which the United States has "otherwise" acquired. The doctrine of *ejusdem generis* is invoked to maintain that "or otherwise" does not encompass the adjudication of reserved water rights, which are in no way dependent for their creation or existence on state law.[3] We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666 (a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights.

[3] See Comment, 48 Calif. L. Rev. 94, 111 (1960).

It is said that this adjudication is not a "general" one as required by *Dugan* v. *Rank*, 372 U. S. 609, 618. This proceeding, unlike the one in *Dugan*, is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill, said in reply to Senator Magnuson: [4] "S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

It is said, however, that since this is a supplemental adjudication only those who claim water rights acquired since the last adjudication of that water district are before the court.[5] It is also said that the earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication.[6] The last water adjudication in this water district was entered on February 21, 1966, and the United States was not a party to that or to any prior proceeding in this water district. The United States accordingly says that since the United States cannot be barred by the previous decrees and since the owners of previously decreed rights are not before the court, the consent envisaged by 43 U. S. C. § 666 is not present.

We think that argument is extremely technical; and we decline to confine 43 U. S. C. § 666 so narrowly. The absence of owners of previously decreed rights may pre-

[4] S. Rep. No. 755, 82d Cong., 1st Sess., 9. And see *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440, 448.

[5] Colo. Rev. Stat. Ann. § 148–9–7.

[6] *Id.*, § 148–9–13.

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sent problems going to the merits, in case there develops a collision between them and any reserved rights of the United States.[7] All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court.

Affirmed.

[For concurring statement of MR. JUSTICE HARLAN, see *post*, p. 530.]

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[7] The Colorado court stated:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn." 169 Colo., at 577, 458 P. 2d, at 770.

Syllabus

UNITED STATES *v.* DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 812. Argued March 2, 1971—
Decided March 24, 1971

In this companion case to *U. S.* v. *District Court for Eagle County, ante,* p. 520, the United States had been served with notice pursuant to 43 U. S. C. § 666 of a proceeding in state court for the adjudication of water rights affecting areas of the State in the drainage basins of the Colorado River system. In addition to its claim that § 666 does not apply to state court suits against the Government for adjudication of its reserved water rights, the Government contended that the state statutory proceedings involved in this case, which contemplated monthly proceedings before a water referee on water rights applications filed within a particular month, do not constitute general adjudications of water rights under § 666 because all the water users and all water rights on a stream system are not implicated in the referee's determinations. The Government's contentions were rejected by the state courts. *Held:*

1. The state court has jurisdiction to adjudicate the reserved water rights of the United States. *Eagle County, supra.* P. 529.

2. The state statutory proceedings are within the scope of § 666 and reach all claims in their totality, although the adjudication is made on a monthly basis. Pp. 529–530.

Affirmed.

MR. JUSTICE DOUGLAS delivered the opinion for a unanimous Court. MR. JUSTICE HARLAN, though joining in the opinion, filed a concurring statement, *post,* p. 530.

Deputy Assistant Attorney General Kiechel argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Samuel Huntington,* and *Edmund B. Clark.*

Kenneth Balcomb argued the cause for respondents. With him on the brief was *Robert L. McCarty.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to the *Eagle County* case, *ante*, p. 520, and involves an action brought under a different state statute [1] in the District Court of Colorado for Water Division No. 5.[2] That court was given responsibility for water rights determinations affecting "all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison river," [3] which includes the area of the Eagle River system.

Notice was served on the United States pursuant to 43 U. S. C. § 666 (b) and it moved to quash the service. That motion was denied. A writ of prohibition was sought in the Supreme Court and it was also denied. The case is here on a petition for a writ of certiorari which we granted. 400 U. S. 940.

The area covered by this suit includes vastly more extensive water rights than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of

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[1] The Colorado Water Rights Determination and Administration Act of 1969, Colo. Rev. Stat. Ann. § 148–21–1 *et seq.*, Colo. Rev. Stat. Ann. § 148–21–18 (3) (Supp. 1969).

[2] The 1969 Act here in question abolished the 70 water districts previously existing and replaced them with seven water divisions.

[3] Colo. Rev. Stat. Ann. § 148–21–8 (6).

Sport Fisheries and Wildlife, makes use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain naval petroleum and oil shale reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservations were made.

The major issue—the scope of the consent-to-be-sued provision in 43 U. S. C. § 666—has been covered in the *Eagle County* opinion and need not be repeated here.

It is emphasized, however, that the procedures under the new Act are much more burdensome on the Government than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded.

It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U. S. C. § 666 contemplated. As we said in the *Eagle County* case, the words "general adjudication" were used in *Dugan* v. *Rank*, 372 U. S. 609, 618, to indicate that 43 U. S. C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adju-

dicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review.

Affirmed.

MR. JUSTICE HARLAN, concurring.*

I join in the opinions of the Court in these cases, explicitly disclaiming, however, the intimation of any view as to the existence and scope of the so-called "reserved water rights" of the United States, either in general or in the particular situations here involved.

*This statement applies also to No. 87, *United States* v. *District Court in and for the County of Eagle et al.*, *ante*, p. 520.

RADICH *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 169. Argued February 22, 1971—Decided March 24, 1971

26 N. Y. 2d 114, 257 N. E. 2d 30, affirmed by an equally divided Court.

Richard G. Green argued the cause for appellant. With him on the briefs were *Shirley Fingerhood* and *Melvin L. Wulf.*

Michael R. Juviler argued the cause for appellee. With him on the brief were *Frank S. Hogan* and *William C. Donnino.*

John B. Hightower et al. filed a brief as *amicus curiae* urging reversal.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

LABINE, TUTRIX *v.* VINCENT, ADMINISTRATOR

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 5257. Argued January 19, 1971—Decided March 29, 1971

Ezra Vincent died intestate, survived by only collateral relations and an illegitimate daughter, whose guardian (appellant) sued to have her declared Vincent's sole heir. The trial court ruled that under Louisiana law the collateral relations took the decedent's property to the exclusion of the daughter, who had been acknowledged by her father but not legitimated. The Louisiana Court of Appeal affirmed. The State Supreme Court denied certiorari. Appellant, relying on *Levy* v. *Louisiana*, 391 U. S. 68, contends that Louisiana's intestate succession laws that bar an illegitimate child from sharing equally with legitimate children in the father's estate constitute an invidious discrimination violative of the Due Process and Equal Protection Clauses of the Constitution. *Held:* The Louisiana statutory intestate succession scheme is within the State's power to establish rules for the protection and strengthening of family life and for the disposition of property, and in view of various statutory alternatives, none of which was chosen by Vincent, did not (unlike the situation in *Levy*) constitute an insurmountable barrier to illegitimate children. Pp. 535–540.

255 La. 480, 231 So. 2d 395, affirmed. See: 229 So. 2d 449.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion, *post*, p. 540. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined, *post*, p. 541.

James J. Cox argued the cause and filed a brief for appellant.

James A. Leithead argued the cause for appellee. With him on the brief was *Norman F. Anderson.*

Briefs of *amici curiae* urging reversal were filed by *Harry D. Krause, Norman Dorsen,* and *Melvin L. Wulf* for the American Civil Liberties Union, and by *Jonathan Weiss* and *David Gilman* for the Center on Social Welfare Policy and Law.

Briefs of *amici curiae* urging affirmance were filed by *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana, and by *A. Leon Hebert* and *E. Drew McKinnis* for the Buras Heirs et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this appeal the guardian (tutrix) of an illegitimate minor child attacks the constitutionality of Louisiana's laws that bar an illegitimate child from sharing equally with legitimates in the estate of their father who had publicly acknowledged the child, but who died without a will. To understand appellant's constitutional arguments and our decision, it is necessary briefly to review the facts giving rise to this dispute. On March 15, 1962, a baby girl, Rita Vincent, was born to Lou Bertha Patterson (now Lou Bertha Labine) in Calcasieu Parish, Louisiana. On May 10, 1962, Lou Bertha Patterson and Ezra Vincent, as authorized by Louisiana law, jointly executed before a notary a Louisiana State Board of Health form acknowledging that Ezra Vincent was the "natural father" of Rita Vincent.[1] This public acknowledgment of parentage did not, under Louisiana law, give the child a legal right to share equally with legitimate children in the parent's estate but it did give her a right to claim support from her parents or their heirs. The acknowledgment also gave the child the capacity under Louisiana law to be a limited beneficiary under her father's will in the event he left a will naming her, which he did not do here.

Ezra Vincent died intestate, that is, without a will, on September 16, 1968, in Rapides Parish, Louisiana, leaving substantial property within the State, but no will to direct its distribution. Appellant, as the guardian of Rita Vincent, petitioned in state court for the appointment of an administrator for the father's estate; for

[1] See App. 8.

a declaration that Rita Vincent is the sole heir of Ezra Vincent; and for an order directing the administrator to pay support and maintenance for the child. In the alternative, appellant sought a declaration that the child was entitled to support and maintenance of $150 per month under a Louisiana child support law.[2]

The administrator of the succession of Ezra Vincent answered the petition claiming that Vincent's relatives were entitled to the whole estate. He relied for the claim upon two articles of the Louisiana Civil Code of 1870: Art. 206, which provides:

> "Illegitimate children, though duly acknowledged, can not claim the rights of legitimate children. . . ."

and Art. 919, which provides:

> "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State."

The court ruled that the relatives of the father were his collateral relations and that under Louisiana's laws of intestate succession took his property to the exclusion of acknowledged, but not legitimated, illegitimate children. The court, therefore, dismissed with costs the guardian mother's petition to recognize the child as an heir. The court also ruled that in view of Social Security payments of $60 per month and Veterans Administration payments of $40 per month available for the support of the child, the guardian for the child was not entitled to support or maintenance from the succession of Ezra Vin-

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[2] La. Civ. Code Ann., Art. 240, provides: "Fathers and mothers owe alimony to their illegitimate children, when they are in need . . . ." Art. 241 provides: "Illegitimate children have a right to claim this alimony, not only from their father and mother, but even from their heirs after their death."

cent.[3] The Louisiana Court of Appeal, Third Circuit, affirmed and the Supreme Court of Louisiana denied a petition for writ of certiorari. The child's guardian appealed and we noted probable jurisdiction. 400 U. S. 817 (1970).

In this Court appellant argues that Louisiana's statutory scheme for intestate succession that bars this illegitimate child from sharing in her father's estate constitutes an invidious discrimination against illegitimate children that cannot stand under the Due Process and Equal Protection Clauses of the Constitution. Much reliance is placed upon the Court's decisions in *Levy* v. *Louisiana,* 391 U. S. 68 (1968), and *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U. S. 73 (1968). For the reasons set out below, we find appellant's reliance on those cases misplaced, and we decline to extend the rationale of those cases where it does not apply. Accordingly, we affirm the decision below.

In *Levy* the Court held that Louisiana could not consistently with the Equal Protection Clause bar an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized. The cause of action alleged in *Levy* was in tort. It was undisputed that Louisiana had created a statutory tort[4] and had provided for the survival of the deceased's cause of action,[5] so that a large class of persons injured by the tort could recover damages in compensation for their injury. Under those circumstances the Court held that the State could not totally exclude from

[3] Rita Vincent qualifies as Ezra Vincent's child for federal social security and veteran's benefits by virtue of his acknowledgment of paternity, 42 U. S. C. § 416 (h)(3)(A)(i)(I) (1964 ed., Supp. V) and 38 U. S. C. § 101 (4) (1964 ed., Supp. V). No question has been raised concerning the legality under federal law of reliance upon such benefits to relieve parents or their estates from the state-imposed obligations of child support.

[4] La. Civ. Code Ann., Art. 2315 (1952).

[5] *Ibid.*

the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort that took their mother's life. *Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.[6]

The people of Louisiana, through their legislature have carefully regulated many of the property rights incident to family life. Louisiana law prescribes certain formalities requisite to the contracting of marriage.[7] Once marriage is contracted there, husbands have obligations to their wives.[8] Fathers have obligations to their children.[9] Should the children prosper while the parents fall upon hard times, children have a statutory obligation to support their parents.[10] To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. The surviving spouse is entitled to an interest in the deceased spouse's estate.[11] Legitimate children have a right of forced heirship in their father's estate and can even retrieve property transferred by their father during his lifetime in reduction of their rightful interests.[12]

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[6] Nor is *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968), analogous to this case. In *Glona* the majority relied on Louisiana's "curious course" of sanctions against illegitimacy to demonstrate that there was no "rational basis" for prohibiting a mother from recovering for the wrongful death of her son. *Id.*, at 74–75. Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State.

[7] La. Civ. Code Ann., Arts. 90–98 (1952).

[8] La. Civ. Code Ann., Arts. 119, 120 (1952).

[9] "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children." La. Civ. Code Ann., Art. 227 (1952). See n. 2, *supra*.

[10] La. Civ. Code Ann., Art. 229 (1952).

[11] La. Civ. Code Ann., Art. 915 (1952).

[12] La. Civ. Code Ann., Arts. 1493–1495 (1952).

Louisiana also has a complex set of rules regarding the rights of illegitimate children. Children born out of wedlock and who are never acknowledged by their parents apparently have no right to take property by intestate succession from their father's estate. In some instances, their father may not even bequeath property to them by will.[13] Illegitimate children acknowledged by their fathers are "natural children." Natural children can take from their father by intestate succession "to the exclusion only of the State." They may be bequeathed property by their father only to the extent of either one-third or one-fourth of his estate and then only if their father is not survived by legitimate children or their heirs.[14] Finally, children born out of wedlock can be legitimated or adopted, in which case they may take by intestate succession or by will as any other child.

These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature "discriminate" against illegitimates. But the rules also discriminate against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants. Other rules determining property rights

[13] "Natural fathers and mothers can, in no case, dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves." La. Civ. Code Ann., Art. 1488 (1952).

[14] La. Civ. Code Ann., Art. 1486 (1952).

based on family status also "discriminate" in favor of wives and against "concubines." [15] The dissent attempts to distinguish these other "discriminations" on the ground that they have a biological or social basis. There is no biological difference between a wife and a concubine, nor does the Constitution require that there be such a difference before the State may assert its power to protect the wife and her children against the claims of a concubine and her children. The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and duties. The other set of relationships is illicit and beyond the recognition of the law. Similarly, the State does not need biological or social reasons for distinguishing between ascendants and descendants. Some of these discriminatory choices are perhaps more closely connected to our conceptions of social justice or the ways in which most dying men wish to dispose of their property than the Louisiana rules governing illegitimate children. It may be possible that some of these choices are more "rational" than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature,

[15] "Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

"Those who afterwards marry are excepted from this rule." La. Civ. Code Ann., Art. 1481 (1952).

not the life-tenured judges of this Court, to select from among possible laws.[16] We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children.[17] Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State.

We emphasize that this is not a case, like *Levy*, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father. Ezra Vincent could have left one-third of his property to his illegitimate daughter had he bothered to follow the simple formalities of executing a will. He could, of course, have legitimated the child by marrying her mother in which case the child could have inherited his property either by intestate succession or by will as any other legitimate child. Finally, he could have awarded his child the benefit of Louisiana's intestate succession statute on the same terms as legitimate children simply by stating in his acknowledgment of paternity his desire to legitimate the little girl. See *Bergeron* v. *Miller*, 230 So. 2d 417 (La. App. 1970).

In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses

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[16] "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 8 How. 490, 493 (1850). See *Lyeth* v. *Hoey*, 305 U. S. 188, 193 (1938).

[17] See Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966).

which empowers this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana.

Affirmed.

MR. JUSTICE HARLAN, concurring.

In joining the opinion of the Court, I wish to add a few words, prompted, I may say, by the dissenting opinion, which in my view evinces extravagant notions of what constitutes a denial of "equal protection" in the constitutional sense.

It is surely entirely reasonable for Louisiana to provide that a man who has entered into a marital relationship thereby undertakes obligations to any resulting offspring beyond those which he owes to the products of a casual liaison, and this whether or not he admits the fact of fatherhood in the latter case.* With respect to a substantial portion of a man's estate, these greater obligations stemming from marriage are imposed by the provision of Louisiana law making a man's legitimate children his forced heirs. For the remainder of his estate, these obligations are not absolute, but are conditional upon his not disposing of his property in other ways. With all respect to my dissenting Brethren, I deem little short of frivolous the contention that the Equal Protection Clause prohibits enforcement of marital obligations, in either the mandatory or the suppletive form. See H. M. Hart & A. Sacks, The Legal Process: Basic Prob-

*Louisiana law authorizes illegitimate children to claim support not only from both parents but also from the parents' heirs. See *ante*, at 534 n. 2. It thus goes considerably beyond the common law and statutes generally in force at the time the Fourteenth Amendment was adopted. These rarely did more than authorize public officials to bring an action directing the putative father to support a child who threatened to become a public charge. See 2 Kent's Commentaries *215 and nn. (b) and (c) (12th ed. O. W. Holmes 1873).

lems in the Making and Application of Law 35–36, 251–256 (tent. ed. 1958).

In addition to imposing these obligations, Louisiana law prohibits testamentary dispositions to one's illegitimate children. Even were my dissenting Brethren prepared to hold this rule of law unconstitutional, to do so would not affect the outcome of this case. First, appellant's child is "natural" rather than "illegitimate"; and second, if the father desired her to have his property after his death, he did not manifest that desire in the appropriate way.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

In my view, Louisiana's intestate succession laws, insofar as they treat illegitimate children whose fathers have publicly acknowledged them differently from legitimate children, plainly violate the Equal Protection Clause of the Fourteenth Amendment. The Court today effectively concedes this, and, to reach its result, resorts to the startling measure of simply excluding such illegitimate children from the protection of the Clause, in order to uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless, and innocent, children. Based upon such a premise, today's decision cannot even pretend to be a principled decision. This is surprising from Justices who have heretofore so vigorously decried decisionmaking rested upon personal predilections, to borrow the Court's words, of "life-tenured judges of this Court." *Ante*, at 539. I respectfully dissent.

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In 1961, Ezra Vincent was 69 years old and Lou Bertha Patterson (now Lou Bertha Labine) was 41. They were unmarried adults living in rural, southwest Louisiana, outside the town of Lake Charles. Soon after meeting each other in 1961, Mrs. Patterson moved in with Mr. Vincent. Although they did not marry, Mrs. Patterson had a daughter by Mr. Vincent on March 15, 1962. The child's birth certificate identified the father and mother by name. Within two months, Mr. Vincent and Mrs. Patterson appeared before a notary public and executed a form, in accordance with Louisiana law, acknowledging that Mr. Vincent was the father of the child. A month later, the child's birth certificate was changed to give the child Mr. Vincent's name,[1] and she has always been known since as Rita Nell Vincent. By acknowledging the child, Mr. Vincent became legally obligated under state law to support her.[2] Mr. Vincent and Mrs. Patterson continued to live together and raise Rita Nell until Mr. Vincent died in 1968. He left no will.

As natural tutrix of Mr. Vincent's only child, Rita Nell's mother brought this suit on the child's behalf seeking to have Rita Nell declared Mr. Vincent's sole heir. Applying Louisiana law,[3] the trial court dismissed the action and declared Mr. Vincent's collateral relations—his brothers and sisters—to be his heirs.[4] The

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[1] Louisiana law appears to direct that the birth certificate be changed only when the child has been legitimated. La. Rev. Stat. § 40:308 (1950).

[2] La. Civ. Code Ann., Art. 242 (1952).

[3] See Part II, *infra*.

[4] In addition, the trial court, despite uncontradicted testimony that the child required $192 per month for support, rejected the claim for alimony from her father's estate, as provided in Louisiana

child's tutrix appealed, arguing that to treat a publicly acknowledged illegitimate child differently from a legitimate child was a denial of equal protection and due process. The Louisiana intermediate appellate court affirmed in all respects, upholding the state statutory provisions against constitutional attack, "[h]owever unfair it may be to punish innocent children for the fault of their parents." 229 So. 2d 449, 452 (1969). The Louisiana Supreme Court declined review, and we noted probable jurisdiction. 400 U. S. 817 (1970).

II

The rationality and constitutionality of Louisiana's treatment of the illegitimate child can only be analyzed against the background of a proper understanding of that State's law. Under Louisiana law, legitimate children have an automatic right to inherit from their parents.[5] Legitimate children generally cannot be disinherited.[6]

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law, La. Civ. Code Ann., Arts. 240–242, 243, 919 (1952), on the ground that the child was receiving $100 per month in Social Security and Veterans Administration benefits.

[5] La. Civ. Code Ann., Art. 1495 (1952), provides:

"In the cases prescribed by the two last preceding articles [legitimate children and parents], the heirs are called *forced heirs*, because the donor can not deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them." (Emphasis in original.)

[6] *Ibid.* A parent can only disinherit a legitimate child if the parent alleges a certain statutorily defined "just cause" in his will and in terms expresses his desire to disinherit the child. La. Civ. Code Ann., Arts. 1617–1620 (1952). Article 1621 of the Louisiana Civil Code specifies the "just causes" for which disinherison is permitted:

"The just causes for which parents may disinherit their children are ten in number, to wit:

"1. If the child has raised his or her hand to strike the parent, or

Property cannot even be given away without taking account of the rights of a legitimate child, since the portion of the decedent's estate that can be given away or disposed of through donations *inter vivos* or *mortis causa* is sharply limited by law for the benefit of a person's legitimate children.[7] Actually the Louisiana Constitution protects this scheme of forced heirship which benefits the decedent's parents as well as his legitimate children.[8]

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if he or she has actually struck the parent; but a mere threat is not sufficient.

"2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.

"3. If the child has attempted to take the life of either parent.

"4. If the child has accused a parent of any capital crime, except, however, that of high treason.

"5. If the child has refused sustenance to a parent, having means to afford it.

"6. If the child has neglected to take care of a parent become insane.

"7. If the child refused to ransom them, when detained in captivity.

"8. If the child used any act of violence or coercion to hinder a parent from making a will.

"9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.

"10. If the son or daughter, being a minor, marries without the consent of his or her parents."

The persons seeking to take against the disinherited forced heir must prove the truth of the "just cause" alleged in the parent's will. *Pennywell* v. *George*, 164 La. 630, 114 So. 493 (1927). Disinherison is not favored. *Succession of Reems*, 134 La. 1033, 64 So. 898 (1914).

[7] La. Civ. Code Ann., Art. 1493 (1952), provides, in pertinent part:

"Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number."

See generally La. Civ. Code Ann., Arts. 1493–1518 (1952).

[8] La. Const., Art. 4, § 16 (1921).

This enshrinement of forced heirship in the state constitution symbolizes Louisiana's extensive legal ordering of familial affairs. Louisiana's regulation of the family covers not merely the devolution of property upon the death of any member, but virtually every aspect of the duties owed by one family member to another, and the authority, particularly of the father, over the other members.[9] This reflects the derivation of Louisiana's legal traditions from the French, Spanish, and Roman civil law; they do not have their roots in English common law:

> "Countries which received the Roman law in one form or another have traditionally ordered relationships between citizens in terms of two institutions, family and obligation. . . . [T]he relationships formed by Romanist man were all grounded in one or both of these institutions. *His relationship with his family was determined by law,* it established his status, and this, in turn, qualified the relationships which he could make with those who were not his family. . . . [A] man's position within his family passed into the modern Roman law as the significant qualification to forming private legal relationships." Tucker, Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes, 44 Tul. L. Rev. 264, 275–276 (1970) (emphasis added).[10]

Thus it is that Louisiana law distinguishes between legitimate children and illegitimate children throughout that law's extensive regulation of family affairs.[11] But, for purposes of this case, I need only discuss those portions of Louisiana law that bear upon inheritance rights.

[9] See, *e. g.*, La. Civ. Code Ann., Arts. 215–237 (1952).

[10] See generally Pelletier & Sonnenreich, A Comparative Analysis of Civil Law Succession, 11 Vill. L. Rev. 323 (1966).

[11] See, *e. g.*, La. Civ. Code Ann., Arts. 215–245 (1952).

Article 178 of the Louisiana Civil Code provides in full: "Children are either legitimate, illegitimate, or legitimated." Not all illegitimate children can be legitimated, however—only those whose parents do not have legitimate descendants or ascendants and could lawfully have married each other at the time of the child's conception, or those whose parents later marry can be legitimated.[12] An illegitimate child who can be legitimated becomes a "natural" child when his father formally acknowledges him. However, Article 206 of the Louisiana Civil Code provides that, "[i]llegitimate children, though duly acknowledged, can not claim the rights of legitimate children." Thus, the primary consequence under Louisiana succession law that flows from acknowledgment is that the natural child may inherit under a will, and inherits if there is no will, only after the father's other descendants, ascendants, collateral relations, and surviving spouse, but before the estate escheats to the State.[13] An illegitimate child whose parents could lawfully have married each other at the time of the child's conception, but who has

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[12] La. Civ. Code Ann., Art. 200 (1952), provides:

"A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. *But only those natural children can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants.*" (Emphasis added.)

La. Civ. Code Ann., Art. 198 (1952), provides:

"Children born out of marriage, except those who are born from an incestuous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage."

[13] See Oppenheim, Acknowledgment and Legitimation in Louisiana—Louisiana Act 50 of 1944, 19 Tul. L. Rev. 325, 327 (1945).

not been publicly acknowledged, or an illegitimate child whose parents were not capable of marriage at the time of conception, may not inherit *at all*, either by will or intestate succession, "the law allowing them nothing more than a mere alimony." La. Civ. Code Ann., Art. 920 (1952).[14]

III

Under Louisiana law a legitimate child would have had an absolute right to inherit Mr. Vincent's estate; Mr. Vincent could not have totally disinherited such a child. This is a consequence of Louisiana's "forced heirship" law, in other words a consequence of a state decision, however contrary that might be to Mr. Vincent's own desires. Similarly in the present case, Mr. Vincent's illegitimate daughter, though duly acknowledged, is denied his intestate estate, not because he wished that result but because the State places her behind Mr. Vincent's collateral relations—indeed behind all his relations—in the line of succession.

The State's discrimination is clear and obvious.[15] Ordinarily, even in cases of economic regulation, this

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[14] See *Succession of Elmore*, 124 La. 91, 49 So. 989 (1909).

[15] As Part II of this opinion makes clear, only parents of illegitimate children who could have married at the time of conception and who have no legitimate ascendants or descendants may legitimate those children by notarial act. See n. 12, *supra*. The Court relies on the fact that Mr. Vincent was within this narrow class of fathers of illegitimate children to suggest that Louisiana law allows fathers to decide whether or not their illegitimate children will inherit the father's estate. *Ante*, at 539. Even as to this class, however, Louisiana law places the burden on the father of a publicly acknowledged illegitimate child to take affirmative action to *inherit* that child, while virtually disabling the same father from disinheriting a legitimate child, or, at least, placing a burden of affirmative action on the father in order to *disinherit* the legitimate child. Thus, even as to this small group, the discrimination imposed by the State is clear.

Court will inquire, under the Equal Protection Clause of the Fourteenth Amendment, whether there is some "reasonable basis" for a discrimination in a state statute, or whether the discrimination is invidious. *E. g., Morey* v. *Doud,* 354 U. S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). Such an inquiry does not question the State's *power* to regulate; rather, it focuses exclusively on whether the State has legislated without the invidious discrimination that is forbidden by the Fourteenth Amendment.

For reasons not articulated, the Court refuses to consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana accords to publicly acknowledged illegitimates and to legitimate children. Rather, the Court simply asserts that "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." *Ante,* at 538. But no one questions Louisiana's power to pass inheritance laws.[16] Surely the Court

[16] The only context in which this statement might have relevance would be in the context of the question, not presented in this case, of the power of Congress to regulate the devolution of property upon the death of citizens of the various States. In such a case, the question would indeed be whether the Constitution commits such power exclusively to the States. It so happens that this Court, in an opinion written by my Brother BLACK, has held that the Constitution does *not* commit the power to regulate intestate succession exclusively to the States. *United States* v. *Oregon,* 366 U. S. 643, 649 (1961) ("The fact that this [federal] law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.").

cannot be saying that the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudication under the Equal Protection and Due Process Clauses. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints. It is, to say the least, bewildering that a Court that for decades has wrestled with the nuances of the concept of "state action" in order to ascertain the reach of the Fourteenth Amendment, in this case holds that the state action here, because it is state action, is insulated from these restraints.

Putting aside the Court's repeated emphasis on Louisiana's power to regulate intestate succession—something not questioned and wholly irrelevant to the present constitutional issue—only two passages in the Court's opinion even attempt an argument in support of today's result. First, the Court tells us that Louisiana intestate succession law favors some classes of a deceased's relatives over other classes. That is certainly true, but the Court nowhere suggests what bearing these other discriminations have on the rationality of Louisiana's discrimination against the acknowledged illegitimate. It is a little like answering a complaint of Negro school children against separate lavatories for Negro and white students by arguing that the situation is no different from separate lavatories for boys and girls, or for elementary school children and high school students. These other discriminations may be rational or irrational. But their only relevance to the rationality and constitutionality of the specific challenged discrimination is the light they throw, if any, on the basis for that discrimination. The conclusion the Court appears to draw from its itemization of other discriminations among a de-

ceased's relatives is that Louisiana needs *no* justification at all for any of the distinctions it draws. That reasoning flies in the face not only of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, but also of the very notion of a rule of law.

The only other hint at an attempt to support today's result may appear in the purported distinction of *Levy* v. *Louisiana*, 391 U. S. 68 (1968): "We emphasize that this is not a case, like *Levy*, where the State has created an insurmountable barrier to this illegitimate child." *Ante*, at 539. There may be two implications in this statement: (1) that in *Levy*, there was an insurmountable barrier to recovery; and (2) that any discrimination that falls short of an "insurmountable barrier" is, without need for further analysis, permissible. As to the first, *Levy* involved an unacknowledged illegitimate child. Louisiana permitted an illegitimate child to recover in tort for the death of the child's mother, under the State's wrongful death act, only if the illegitimate child had been acknowledged. There was no insurmountable barrier to the child's recovery; if the mother had formally acknowledged the child, recovery would have been permitted. My Brother HARLAN's dissent emphasized this fact and argued that the State was entitled to rely on specified formalities. Plainly then *Levy* did not involve any "insurmountable barrier."

The Court's second implication—that any discrimination short of an "insurmountable barrier" is permissible—is one of those propositions the mere statement of which is its own refutation. *Levy*, as I have pointed out, holds squarely to the contrary specifically in the context of discrimination against illegitimate children. And numerous other cases in this Court establish the general proposition that discriminations that "merely" disadvantage a class of persons or businesses are as subject to

the command of the Fourteenth Amendment as discriminations that are in some sense more absolute.[17]

In short, the Court has not analyzed, or perhaps simply refuses to analyze, Louisiana's discrimination against acknowledged illegitimates in terms of the requirements of the Fourteenth Amendment.[18] Since I still believe that the Constitution does prohibit a State from denying any person the "equal protection of the laws," I must therefore undertake my own analysis to determine, at a minimum, whether there is any rational basis for the discrimination, or whether the classification bears any intelligible proper relationship to the consequences that flow from it.[19] See, *e. g., Dandridge* v. *Williams,* 397 U. S. 471 (1970); *McLaughlin* v. *Florida,* 379 U. S. 184,

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[17] *E. g., Dandridge* v. *Williams,* 397 U. S. 471 (1970); *Morey* v. *Doud, supra; Hunter* v. *Erickson,* 393 U. S. 385 (1969); *Douglas* v. *California,* 372 U. S. 353 (1963); *Smith* v. *Cahoon,* 283 U. S. 553 (1931). Cf. *Plessy* v. *Ferguson,* 163 U. S. 537 (1896); *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

[18] In one sentence in a footnote, the Court says, "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." *Ante,* at 536 n. 6. I agree that Louisiana has an interest in promoting family life and in directing the disposition of property left within the State. I do not understand how either of these interests provides any basis for Louisiana's discrimination against the acknowledged illegitimate, and the Court does not explain the relevance of these state interests.

[19] In view of my conclusion that the present discrimination cannot stand even under the "some rational basis" standard, I need not reach the questions whether illegitimacy is a "suspect" classification that the State could not adopt in any circumstances without showing a compelling state interest, or whether fundamental rights are involved, which also would require a showing of a compelling state interest. See *Levy* v. *Louisiana,* 391 U. S. 68, 71 (1968); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). This Court has generally treated as suspect a classification that discriminates against an individual on the basis of factors over which he has no control.

190–191 (1964); *Morey* v. *Doud, supra; Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 155 (1897).

Certainly, there is no biological basis for the State's distinction. Mr. Vincent's illegitimate daughter is related to him biologically in exactly the same way as a legitimate child would have been. Indeed, it is the identity of interest "in the biological and in the spiritual sense," *Levy* v. *Louisiana,* 391 U. S., at 72, and the identical "intimate, familial relationship," *id.,* at 71, between both the legitimate and illegitimate child, and their father, which is the very basis for appellant's contention that the two must be treated alike.

Louisiana might be thought to have an interest in requiring people to go through certain formalities in order to eliminate complicated questions of proof and the opportunity for both error and fraud in determining paternity after the death of the father. This argument, of course, was the focal point of the dissent in *Levy* and *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U. S. 73 (1968). I leave aside, for the moment, the fact that the holdings of those two cases indicate that this consideration is insufficient to justify a difference in treatment when there is no dispute over the fact of parentage. For my Brother HARLAN's dissenting opinion in those cases explicitly recognized that the State's interest in this regard is fully satisfied by a formal public acknowledgment. 391 U. S., at 80. When a father has formally acknowledged his child or gone through any state authorized formality for declaring paternity, or when there has been a court judgment of paternity, there is no possible difficulty of proof, and no opportunity for fraud or error. This purported interest certainly can offer no justification for distinguishing between a formally acknowledged illegitimate child and a legitimate one.

It is also important not to obscure the fact that the formality of marriage primarily signifies a relationship

between husband and wife, not between parent and child. Analysis of the rationality of any state effort to impose obligations based upon the fact of marriage must, therefore, distinguish between those obligations that run between parties to the marriage and those that run to others. My Brother HARLAN, unlike his colleagues in the majority, concedes that the Equal Protection Clause requires a justification for Louisiana's discrimination against illegitimates, and he attempts one; he argues that it is reasonable for a State to impose greater obligations on a man in respect to his wife and their children than in respect to other women and any other children of whom he may be the father. In other words, contrary to the Louisiana court below, he apparently believes that Louisiana's discrimination against illegitimates reflects a state policy that would discourage marriage by imposing special burdens, such as those of forced heirship, upon those who enter into it. However that may be, such force as his argument may have stems directly from its lack of specificity. Imposition by a State of reciprocal obligations upon husband and wife that are not imposed upon those who do not enter into a formalized marriage relationship is based upon the assumptions (1) that marriage may be promoted through pressure applied on or by the party seeking the benefit of obligations imposed by the married status, and (2) that in any event the choice is entirely within the control of the two individuals concerned. These elements are entirely lacking when we consider the relationship of a child *vis-à-vis* its parents. Precisely this point was made approvingly by Chancellor Kent, relied upon by my Brother HARLAN, early in the 19th century:

> "This relaxation in the laws of so many of the states, of the severity of the common law [discrimina-

> tion against illegitimates], rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity." 2 J. Kent, Commentaries *213 (12th ed. O. Holmes 1873).[20]

Intestate succession laws might seek to carry out a general intent of parents not to provide for publicly acknowledged illegitimate children. However, as the summary of Louisiana law I have made shows, one of the primary hallmarks of Louisiana's civil code is its detailed, extensive regulation of the family relationship. Its discrimination against the illegitimate in matters of inheritance and succession is official state policy, completely negating any argument that such discrimination merely represents a legislative judgment about the probable wishes of a deceased or the desires of most persons in similar situations. The opinion of the state court below itself eliminates that possibility. The Louisiana court

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[20] The concurring opinion suggests that the legal obligation to support the illegitimate child imposed by Louisiana law goes "considerably beyond the common law and statutes generally in force at the time the Fourteenth Amendment was adopted." *Ante*, at 540 n. The authority cited by the concurrence for this proposition describes early 19th century American law on the subject as follows: "The mother, or reputed father, is generally in this country chargeable by law with the maintenance of the bastard child; and in New York it is in such way as any two justices of the peace of the county shall think meet; and the goods, chattels, and real estate of the parents are seizable for the support of such children, if the parents have absconded. The reputed father is liable to arrest and imprisonment until he gives security to indemnify the town chargeable with the maintenance of the child. These provisions are intended for the public indemnity, and were borrowed from the several English statutes on the subject; and similar regulations to coerce the putative father to maintain the child, and indemnify the town or parish, have been adopted in the several states." 2 J. Kent, Commentaries *215 (12th ed. O. Holmes 1873).

affirmatively states that the disinheritance of acknowledged illegitimates is in furtherance of specific state policy goals—goals that are unrelated to parents' intentions. 229 So. 2d, at 452. Finally, viewing the general statutory treatment of illegitimates as a whole, particularly the facts that only a narrow class of fathers can legitimate their children by declaration, and that unacknowledged and "adulterous" illegitimates are prohibited from inheriting even by will, I think the conclusion is compelled that Louisiana's discrimination represents state policy, not an attempt to aid in the effectuation of private desires.

Even if Louisiana law could be read as being based on a legislative judgment about parents' intent, the present discrimination against illegitimates could not stand. In order to justify a discrimination on the ground that it reflects a legislative judgment about the desires of most persons in similar situations, there must be some rational basis [21] for finding that the legislative classification does reflect those persons' desires or intentions as a general matter. The Court makes no argument that fathers who have publicly acknowledged their illegitimate children generally intend to disinherit them. No Louisiana court opinion or Louisiana legislative pronouncement that I can discover, or the Attorney General of Louisiana in this case, has ever argued that the Louisiana scheme reflects the general intentions of fathers of illegitimate children in that State. Indeed, the state court below justified the discrimination on the ground that "the denial of inheritance rights to illegitimates might reasonably be viewed as encouraging marriage and legitimation of children." 229 So. 2d, at 452. Such denial could encourage marriage only if fathers generally desire to leave their property to their illegitimate children; otherwise, disin-

[21] But see n. 19, *supra*.

heritance would not operate as a sanction to encourage marriage.

Moreover, logic and common experience also suggest that a father who has publicly acknowledged his illegitimate child will *not* generally intend to disinherit his child. A man who publicly announces that he has fathered a child out of wedlock has publicly claimed that child for his own. He has risked public opprobrium, or other sanctions, to make the public announcement. Surely, it does not follow that he will generally desire to disinherit that child and further discredit his reputation by refusing to contribute to his own child at death. All the writings cited to us, including a United Nations study report,[22] an English study commission,[23] the proposed Uniform Probate Code,[24] and a variety of law review commentary in this country,[25] suggest precisely the opposite conclusion. Moreover, Louisiana is the only State in the country that denies illegitimate children rights of inheritance from the mother equal to those of

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[22] Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, Study of Discrimination against Persons Born Out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock, U. N. Doc. E/CN. 4 Sub. 2/L 453 (Jan. 13, 1967).

[23] Stone, Report of the Committee on the Law of Succession in Relation to Illegitimate Persons, 30 Mod. L. Rev. 552 (1967).

[24] National Conference of Commissioners on Uniform State Laws, Uniform Probate Code § 2–109 (official text 1969).

[25] Note, Illegitimacy, 26 Brooklyn L. Rev. 45 (1959); Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967); Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966); Gray & Rudovsky, The Court Acknowledges the Illegitimate: *Levy* v. *Louisiana* and *Glona* v. *American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1 (1969); Note, The Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

legitimate children,[26] and one of only four States that have expressly provided by statute that the illegitimate child may not inherit from his father.[27] The legislatures of 20 States by statute allow acknowledged illegitimate children to inherit equally from their fathers.[28] Three States grant equal rights of inheritance from the father regardless of acknowledgment.[29] The legislatures of the other 23 States have not passed upon the question.

The Court nowhere mentions the central reality of this case: Louisiana punishes illegitimate children for the misdeeds of their parents. The judges of the Third Circuit Court of Appeal of Louisiana, whose judgment the Court here reviews, upheld the present discrimination "[h]owever unfair it may be to punish innocent children for the fault of their parents . . . ." 229 So. 2d, at 452. It is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which

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[26] See the table summarizing state statutes in Note, Illegitimacy, 26 Brooklyn L. Rev. 45, 76–79 (1959). In 1959, New York as well as Louisiana did not allow illegitimate children to inherit equally from their mothers. New York has since changed its law. N. Y. Est., Powers & Trusts Law § 4–1.2 (a)(1)(1967).

[27] Hawaii Rev. Laws § 577–14 (1968); Ky. Rev. Stat. § 391.090 (1962); Pa. Stat. Ann., Tit. 20, § 1.7 (1950).

[28] Cal. Prob. Code § 255 (Supp. 1971); Colo. Rev. Stat. Ann. § 153–2–8 (1963); Fla. Stat. § 731.29 (1965); Ga. Code Ann. § 74–103 (1964); Idaho Code § 14–104 (1947); Ind. Ann. Stat. § 6–207 (1953) [adjudication of paternity required]; Iowa Code § 633.222 (1971); Kan. Stat. Ann. § 59–501 (1964); Mich. Stat. Ann. § 27.3178 (153) (Supp. 1970); Minn. Stat. § 525.172 (1967); Mont. Rev. Codes Ann. § 91–404 (1964); Neb. Rev. Stat. § 30–109 (1964); Nev. Rev. Stat. § 134.170 (1967); N. M. Stat. Ann. § 29–1–18 (1953); N. Y. Est., Powers & Trusts Law § 4–1.2 (1967) [order of filiation required]; Okla. Stat. Ann., Tit. 84, § 215 (1970); S. D. Compiled Laws Ann. § 29–1–15 (1967); Utah Code Ann. § 74–4–10 (1953); Wash. Rev. Code § 11.04.081 (1967); Wis. Stat. Ann. § 237.06 (Supp. 1970).

[29] Ariz. Rev. Stat. Ann. § 14–206 (1956); N. D. Cent. Code § 56–01–05 (Supp. 1969); Ore. Rev. Stat. §§ 111.231, 109.060 (1957).

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he never had any control. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). The state court below explicitly upheld the statute on the ground that the punishment of the child might encourage the parents to marry.[30] If that is the State's objective, it can obviously be attained far more directly by focusing on the parents whose actions the State seeks to influence. Given the importance and nature of the decision to marry, cf. *Boddie* v. *Connecticut*, *ante*, p. 371, I think that disinheriting the illegitimate child must be held to "bear no intelligible proper relation to the consequences that are made to flow" from the State's classification. *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S., at 81 (HARLAN, J., dissenting).

In my judgment, only a moral prejudice, prevalent in 1825 when the Louisiana statutes under consideration were adopted, can support Louisiana's discrimination against illegitimate children. Since I can find no rational basis to justify the distinction Louisiana creates between an acknowledged illegitimate child and a legitimate one, that discrimination is clearly invidious.[31] *Morey* v. *Doud*, 354 U. S. 457 (1957). I think the Supreme Court of North Dakota stated the correct principle in invalidat-

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[30] The state court also argued that Louisiana's disinheritance of the illegitimate would serve the State's interest in the stability of land titles, by avoiding "the disruptions and uncertainties to result from unknown and not easily ascertained claims through averments of parentage . . . ." 229 So. 2d, at 452. This is simply a variation on the State's interest in relying on formalities, see *supra*, at 552, which is completely served by public acknowledgment of parentage and simply does not apply to the case of acknowledged illegitimate children.

[31] See n. 19, *supra*.

ing an analogous discrimination in that State's inheritance laws: "This statute, which punishes innocent children for their parents' transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all." *In re Estate of Jensen*, 162 N. W. 2d 861, 878 (1968).

WHITELEY *v.* WARDEN, WYOMING STATE PENITENTIARY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 136. Argued January 13, 1971—Decided March 29, 1971

A sheriff, acting on a tip, made a complaint before a magistrate charging that petitioner and another individual on the date and at the place named "did then and there unlawfully break and enter into [the described] locked . . . building," and a warrant was issued. A police radio bulletin named and described the two persons, the type of car they were probably driving, and the amount and type of money taken. Relying on the bulletin, an officer in another county made a warrantless arrest of the suspects. The car was then searched and various incriminating items removed, which were later used at petitioner's trial, which resulted in his conviction. Petitioner filed a habeas corpus petition reiterating the challenge he had made at his arraignment and trial to the constitutionality of the use of evidence seized during a search incident to the assertedly illegal arrest. The District Court denied the petition, and the Court of Appeals affirmed. *Held:*

1. Petitioner's arrest violated his rights under the Fourth and Fourteenth Amendments and the evidence secured incident thereto should have been excluded from his trial. Pp. 564–569.

(a) The complaint, which did not mention that the sheriff acted on an informer's tip, and which consisted of no more than the sheriff's conclusion that the individuals named committed the offense, could not support the independent judgment of a disinterested magistrate. P. 565.

(b) The standards applicable to the factual basis for an arresting officer's probable-cause assessment are no less strict than those applicable to the magistrate's assessment. Here the arresting officer had no information to corroborate the report that the suspects had committed the crime and the fact that the warrantless arrest was based on a police radio bulletin cannot supply the element of probable cause that the officer who issued the bulletin lacked. Pp. 565–567.

2. Since, notwithstanding petitioner's constitutional challenge at each stage, respondent made no attempt to show that the magistrate had more information than was presented in the com-

plaint, he may not attempt to do so now on remand; and the writ must issue unless the State appropriately arranges to retry the petitioner. P. 569.

416 F. 2d 36, reversed and remanded.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BLACK, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 570. BLACKMUN, J., filed a dissenting statement, *post*, p. 575.

William J. Knudsen, Jr., argued the cause for petitioner. With him on the briefs was *Richard A. Mullens*.

Jack Speight, Assistant Attorney General of Wyoming, argued the cause for respondent. With him on the brief was *James E. Barrett*, Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner Whiteley, in 1965, was convicted in the District Court for the Second Judicial District of the State of Wyoming on charges of breaking and entering and being an habitual criminal.[1] Both at his arraignment and at trial Whiteley challenged the constitutionality of the use of evidence seized during a search incident to an arrest which he claimed was illegal. The trial court overruled petitioner's motion to suppress, and on appeal the Supreme Court of Wyoming affirmed. *Whiteley* v. *State*, 418 P. 2d 164 (1966). This proceeding commenced with a petition for habeas corpus in the United States District Court for the District of Wyoming, which was denied on November 25, 1968.[2] *Whiteley* v. *Wyoming*, 293 F. Supp. 381. On appeal, the United States Court of Appeals for

[1] He was given concurrent sentences on the breaking and entering charges of one to 10 years and, in consequence of the recidivist charge, imprisonment for life.

[2] Prior to commencing federal habeas corpus proceedings, Whiteley had filed a petition for post-conviction relief pursuant to the Wyoming statutes. No appeal was taken from the denial of that petition.

the Tenth Circuit affirmed. *Whiteley* v. *Meacham*, 416 F. 2d 36 (1969). We granted certiorari, limiting the writ to the issue of the constitutionality of the arrest and ensuing search and seizure. 397 U. S. 1062 (1970).[3] We reverse the judgment of the Tenth Circuit for the reasons stated herein.

I

The circumstances surrounding petitioner's arrest and the incidental search and seizure, as stated by the Wyoming Supreme Court, 418 P. 2d 164, 165–166, are as follows:[4]

> "On November 23, 1964, certain business establishments in Saratoga were broken into, including the Rustic Bar and Shively's Hardware, the offenses being investigated by the Carbon County Sheriff [Sheriff Ogburn] who, acting on a tip, the next day signed a complaint charging defendant and another with breaking and entering the building identified

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[3] In his petition for habeas corpus, Whiteley raised several other issues which had previously been advanced in his state petition for post-conviction relief, but not in his direct appeal to the Supreme Court of Wyoming. On these other issues, both lower federal courts held that failure to appeal the denial of his state post-conviction petition constituted nonexhaustion of state remedies. Petitioner sought to raise the exhaustion issue in his present petition for certiorari, but, as noted in text, we granted the writ limited to the search and seizure issue decided by the lower federal courts.

[4] At the outset of the federal habeas corpus proceeding now before us, both parties entered into the following stipulation, App. 10:

"IT IS HEREBY STIPULATED by and between the parties through their respective counsel that, pursuant to the agreement of the parties in open court on February 16, 1968, both sides will rely exclusively on the record before the trial court in the original case of the State of Wyoming v. Harold Whiteley . . . and any and all parts of the record on appeal to the State of Wyoming . . . in the hearing on the merits of this case before the [U. S. District Court]."

as the Rustic Bar. This complaint was made before a justice of the peace at approximately 11:30 a. m. on the 24th, and a warrant issued. After the investigation, the sheriff put out a state item on the radio to pick up two suspects of the breaking and entering, defendant and another. The message went to the network at Casper and was transmitted over the State, received by the Albany County Sheriff's Office and communicated to the Laramie Police Department, the message giving names and descriptions of the two persons and advising the type of car probably being driven and the amount of money taken, including certain old coins with the dates. Late at night on November 24, a Laramie patrolman, in reliance on the information in the radio item, arrested the defendant and his companion. At the time, the patrolman had no warrant for defendant's arrest nor search warrant. The officer together with a deputy sheriff, who had come up in the meantime, searched the car and removed a number of items introduced in evidence, including tools and old coins, identified at the trial as taken from Shively's Hardware. . . ."

Sheriff Ogburn's complaint, which provided the basis for the arrest warrant issued by the justice of the peace, is as follows:

"I, C. W. Ogburn, do solemnly swear that on or about the 23 day of November, A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building [describing the location and ownership of the building]." App. 28.

A state item 881, the bulletin which Sheriff Ogburn

put out on the radio and which led to petitioner's arrest and search by the Laramie patrolman, is as follows:

> "P & H for B & E Saratoga, early A. M. 11–24–64. Subj. #1. Jack Daley, WMA, 38, D. O. B. 2–29–[26], 5'10", 175, med. build, med. comp., blonde and blue. Tat. left shoulder: 'Love Me or Leave Me.' #2. Harold Whitley, WMA, 43, D. O. B. 6–22–21, 5' 11", 180, med. build, fair comp. brown eyes. Tat. on right arm 'Bird.' Poss. driving 1953 or 1954 Buick, light green bottom, dark top. Wyo. lic. 2-bal. unknown. Taken: $281.71 in small change, numerous old coins ranging from .5¢ pieces to silver dollars, dated from 1853 to 1908. Warrant issues, will extradite. Special attention Denver. . . ." App. 31.[5]

II

The decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.[6] *Spinelli* v. *United States*, 393 U. S. 410 (1969); *United States* v. *Ventresca*, 380 U. S. 102 (1965); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Rugendorf* v. *United States*, 376 U. S. 528 (1964); *Jones* v. *United States*, 362 U. S. 257 (1960); *Giordenello* v. *United States*, 357 U. S. 480 (1958). In the instant case—so far as the record stipulated to by the parties

[5] A second version of state item 881 is identical in all relevant respects except that it omits reference to the arrest warrant. See App. 37.

[6] In *Ker* v. *California*, 374 U. S. 23 (1963), the Court held that the same probable-cause standards were applicable to federal and state warrants under the Fourth and Fourteenth Amendments. In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the Court held the exclusionary rule was applicable to state prosecutions.

reveals [7]—the sole support for the arrest warrant issued at Sheriff Ogburn's request was the complaint reproduced above.[8] That complaint consists of nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint. The actual basis for Sheriff Ogburn's conclusion was an informer's tip, but that fact, as well as every other operative fact, is omitted from the complaint. Under the cases just cited, that document alone could not support the independent judgment of a disinterested magistrate.

The State,[9] however, contends that regardless of the sufficiency of the complaint to support the arrest warrant, the Laramie police officer who actually made the

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[7] See n. 4, *supra*.

[8] The dissent seems to imply that "this record shows" that Sheriff Ogburn received the description of the car contained in the radio bulletin from someone who also informed him that he also saw the car at the scene of the crime. *Post*, at 570. The record wholly fails to support any such implication. Sheriff Ogburn, who testified on four separate occasions at the trial, see R. 105–112, 187–191, 310–314, 335–337, said nothing of the sort. Only one other witness, Leonard Russell Marion, testified to having given Ogburn any information about the car prior to Whiteley's arrest; Marion never testified to seeing the car near the scene of the crime. R. 317–322, 329–330. Indeed, it is quite apparent from reading Marion's testimony that his observations of Whiteley on the day of the robbery took place at his own house. R. 320–321.

More importantly, even the dissent apparently concedes that as far as the record in this case reveals, the only information Sheriff Ogburn communicated to the magistrate issuing the warrant was contained in his written complaint reproduced above. Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. See *Aguilar* v. *Texas*, 378 U. S. 108, 109 n. 1. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.

[9] Since this is a federal habeas corpus proceeding, the State is technically not a party.

arrest possessed sufficient factual information to support a finding of probable cause for arrest without a warrant. In support of this proposition, the State argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant.[10] That proposition has been consistently rejected by this Court. *United States* v. *Ventresca*, 380 U. S., at 105–109; *Aguilar* v. *Texas*, 378 U. S., at 110–111; *Jones* v. *United States*, 362 U. S., at 270–271. And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment. See *McCray* v. *Illinois*, 386 U. S. 300, 304–305 (1967).

Applying those standards to the instant case, the information possessed by the Laramie police officer at the time of arrest and search consisted of: (1) the data contained in state bulletin 881, reproduced *supra;* (2) the knowledge, obtained by personal observation, that two men were driving a car matching the car described in the radio bulletin; (3) the knowledge, possessed by one of the arresting officers, that one of the people in the car was Jack Daley, App. 71; (4) the knowledge, acquired

[10] "The legal principles relied upon by the state throughout this entire litigated process have been based on the premise that a law enforcement officer may make a warrantless arrest if he has requisite probable cause, which can be something less than the requisite probable cause that must be presented to a judicial officer prior to the issuance of an arrest or search warrant." Brief for Respondent 6.

by personal observation, that the other individual in the car fitted the description of Whiteley contained in state bulletin 881; and (5) the knowledge, acquired by the officer after stopping Whiteley, that he had given a false name.[11]

This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. *Draper* v. *United States,* 358 U. S. 307 (1959). See *Spinelli* v. *United States,* 393 U. S. 410 (1969). But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony. See the opinions of the Court and that of MR. JUSTICE WHITE concurring in *Spinelli* v. *United States, supra,* and p. 423. In the present case, the very most the additional information tended to establish is that either Sheriff Ogburn, or his informant, or both of them, knew Daley and Whiteley and the kind of car they drove; the record is devoid of any information at any stage of the proceeding from the time of the burglary to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion that these men were connected with the crime. *Spinelli* v. *United States, supra; McCray* v. *Illinois, supra; Aguilar* v. *Texas, supra.*

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[11] After arresting Whiteley and Daley, the officers searched the car and discovered in the car's interior the old coins taken in one of the burglaries and described in the radio bulletin. In addition, they found burglar's tools in the trunk of the car. Of course, the discoveries of an illegal search cannot be used to validate the probable-cause judgment upon which the legality of the search depends.

The State, however, offers one further argument in support of the legality of the arrest and search: the Laramie police relied on the radio bulletin in making the arrest, and not on Sheriff Ogburn's unnamed informant. Clearly, it is said, they had probable cause for believing that the passengers in the car were the men described in the bulletin, and, in acting on the bulletin, they reasonably assumed that whoever authorized the bulletin had probable cause to direct Whiteley's and Daley's arrest. To prevent arresting officers from acting on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime would, it is argued, unduly hamper law enforcement.

We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to corroborate the informer's tip that Daley and Whiteley committed the crime.[12] Therefore, petitioner's arrest vio-

[12] The arrest warrant issued at about noon on November 24, 1964. See App. 53. State bulletin 881 was broadcast at 3:03 p. m. that same day. App. 31. It is apparent that Sheriff Ogburn did not himself acquire additional corroborative data possibly supporting a probable-cause arrest after securing the warrant.

lated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial. *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

III

There remains the question as to the proper disposition of this case. The State urges us to remand so that it will have an opportunity to develop a record which might show that the issuing magistrate had factual information additional to that presented in Sheriff Ogburn's complaint. Brief for Respondent 8–9. Yet the State concedes, as on the record it must, that at every stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest. Brief for Respondent 4. Knowing the basis for petitioner's constitutional claim, the State chose to try those proceedings on the record it had developed in the state courts. See n. 4, *supra.* Its sole explanation for this state of affairs is that "the state has felt, based on precedent and logic, that no court would accept the legal reasoning of petitioner." Brief for Respondent 9. In the circumstances of this case, that justification, as we have shown, is untenable.

Pursuant to our authority under 28 U. S. C. § 2106 to make such disposition of the case "as may be just under the circumstances," we reverse the judgment of the Tenth Circuit and remand with directions that the writ is to issue unless the State makes appropriate arrangements to retry petitioner.[13] Cf. *Giordenello* v. *United States,* 357 U. S., at 487–488.

It is so ordered.

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[13] The State makes a halfhearted attempt to argue that the introduction of the illegally seized evidence was harmless error. The

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

With all respect to my Brethren who agree to the judgment and opinion of the Court, I am constrained to say that I believe the decision here is a gross and wholly indefensible miscarriage of justice. For this reason it may well be classified as one of those calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity. Here is what this record shows:

On the night of November 23, 1964, several establishments, including a bar and hardware store were broken into at the village of Saratoga, Wyoming. Some old coins and other items were taken from the hardware store. Some people saw petitioner and his companion that night in or near Saratoga. The next morning the sheriff, who lived at Rawlins, the county seat, another village in sparsely settled Carbon County,[1] investigated the burglaries. In addition to viewing the scene of the crimes, the sheriff received a rather detailed description of the car, including a portion of the license plate number, said to have been used by the burglars. The sheriff also received a tip that persuaded him that petitioner and his companion, Jack Daley, were probably guilty of one of the burglaries. Upon the strength of this tip, coupled

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evidence, of course, was damning, to say the least. See n. 10, *supra*. The only other evidence implicating Whiteley was his accomplice's testimony. It is clear that the error cannot be said to be harmless under applicable standards. *Chapman* v. *California*, 386 U. S. 18 (1967); *Harrington* v. *California*, 395 U. S. 250 (1969).

Contrary to the implications in the dissenting opinion, see *post*, at 571, no witness at trial other than the accomplice placed Whiteley "near the scene of the crime" on the night of the robbery.

[1] The population of Carbon County according to the 1970 census is about 13,000 persons.

with his observation of the scene of the crimes and the description of the vehicle, the sheriff personally appeared before the justice of the peace in Rawlins to secure a warrant for the arrest of petitioner and his companion. After securing the warrant he authorized and sent a statewide radio police alert describing the men and their car and calling upon officers to arrest them. The night of November 24, policemen at Laramie, Wyoming, learned that petitioner's companion, Daley, was in the city. They located and stopped the car described in the alert, finding it occupied by two men matching the descriptions contained in the message. One of the officers personally recognized Jack Daley. In response to a request for identification, Harold Whiteley gave police a false name. At that point the two men were arrested and the car was searched. Old coins, tools, and other items later identified at trial as having been taken from the burglarized hardware store were found in the trunk and interior of the car.

At the trial the seized items were introduced into evidence over petitioner's objection. In addition, petitioner was identified as having been near the scene of the crime on the night of November 23.[2] Jack Daley, petitioner's companion, told the jury in vivid detail how he and Whiteley jimmied open the back door and burglarized the hardware store.[3] Petitioner took the stand

[2] Leonard Russell Marion testified at trial that he had seen Whiteley at his home in Saratoga, a town of about 1,000 population, on the day of the robbery. Mr. Marion further testified that he observed Whiteley's car and a portion of the license plate number and gave that information to the sheriff. See R. 317–321, 329–330. The majority fails to recognize that Saratoga is a very small country town and that strangers are most unlikely to move about unnoticed. Something obviously aroused Mr. Marion's suspicion or else he would not have reported the observation of petitioner and his car to the sheriff.

[3] Daley's testimony was not uncorroborated. He testified in detail about the trip from Laramie to Saratoga where the crime was com-

and presented an alibi defense which was discredited by several witnesses including Jack Daley. Petitioner was convicted and sentenced to 10 years for burglary and concurrently to life imprisonment under Wyoming law because of his several prior convictions. It was charged and proved that he had been convicted of three felonies and the record shows that he was 43 year of age and had already served six times in the penitentiary. The Supreme Court of Wyoming affirmed the conviction September 15, 1966, *Whiteley* v. *State*, 418 P. 2d 164, holding that the Laramie officers had a right and duty to arrest the men in their vehicle because they had reasonable ground to believe the men had committed a burglary and that they had the fruits of their crime in the car, citing among other cases *Carroll* v. *United States*, 267 U. S. 132 (1925). See also *Chambers* v. *Maroney*, 399 U. S. 42 (1970).

I think it is a distortion of the Fourth Amendment's meaning to hold that this petitioner's arrest and the seizure of the goods he had stolen were an "unreasonable arrest" and an "unreasonable seizure." In deciding this question it should always be remembered that the Fourth Amendment itself does not expressly command that evidence obtained by its infraction should always be excluded from proof.

There was certainly probable cause to arrest this man. The store was burglarized. The county was a sparsely settled one in which people knew one another. Petitioner, whose previous life would appear to have earned for him the title of professional in the stealing vocation,

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mitted with stops in Medicine Bow and Elk Mountain. Ernest Hornden testified at trial that Daley and Whiteley were in the Dip Bar in Medicine Bow on the night of November 23, 1964, shortly before the burglary. Another witness, LeRoy Hansen, testified that Whiteley was in Elk Mountain on the day of the burglary, see R. 315–316.

was seen around the store with his car the very night of the burglary. Undoubtedly this longtime county sheriff (who appears still to be sheriff) was bound to know petitioner. The tip he received was so persuasive to him that in the performance of his official duty he was willing to assume all the risk incident to having petitioner arrested. It surely cannot be said that when a sheriff, with his prestige and standing, and bond against civil suit, communicates an emergency message to arrest men in cars as burglars, a policeman must stand supinely by while two people denounced as burglars go along their way. Of course these policemen had enough information from the sheriff to have probable cause to arrest petitioner.

My disagreement with the majority concerning the wisdom and constitutional necessity of a "little trial" before a magistrate or justice of the peace prior to the issuance of a search or arrest warrant is a matter of record. See *Aguilar* v. *Texas*, 378 U. S. 108, 116 (1964) (Clark, J., dissenting); *Spinelli* v. *United States*, 393 U. S. 410, 429 (1969) (BLACK, J., dissenting). But even accepting those decisions, *arguendo*, they do not control the disposition of this case which involves the apprehension of criminals in an automobile moving away from the scene of the crime less than 24 hours after its commission. The sheriff's belief that Whiteley and Daley were guilty, even if it was only a "suspicion" as the majority seems to label it, gave police officers proper grounds to stop petitioner's car and inquire about its passengers. *Terry* v. *Ohio*, 392 U. S. 1 (1968). And once the officers stopped the car and positively identified Jack Daley, they had every reason to believe that Whiteley was lying and attempting to escape detection when he reported a false name. At least at that point, if not before, the Laramie police had probable cause to arrest petitioner and Daley. With probable cause to arrest the men, they also had

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authority to search the car. Such a search could be justified under either of two theories. Even under *Chimel* v. *California*, 395 U. S. 752 (1969), the search of an automobile incident to the arrest of the occupants is permissible. And in this very case, the officers found a fully loaded handgun in the glove compartment. The search was also permissible under the "movable vehicle" exception to the usual requirement for a search warrant. *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925). I consider it a travesty of justice to turn this man out of jail or give him a new trial six years after he was convicted.[4]

Fay v. *Noia*, 372 U. S. 391 (1963), does not, in my judgment, justify what the Court is doing. The trial court passed on this issue of validity of petitioner's arrest some years ago. Later he asked for relief through state post-conviction procedures on the same ground and his claim was rejected. He has now sought relief through federal habeas corpus. After the United States District Court and the Court of Appeals rejected his unlawful-search claim, bringing to 10 the number of state and federal judges who have consistently and unanimously rejected petitioner's claim, this Court reverses his judgment of conviction, although petitioner does not, of course, now allege his innocence. As I said in *Kaufman* v. *United States*, 394 U. S. 217, 231 (BLACK, J., dissenting), the *Fay* v. *Noia* remedy should be limited as it

[4] The search in this case took place on November 24, 1964. Although I disagreed with *Spinelli* v. *United States*, 393 U. S. 410 (1969), I have always believed that constitutional decisions should be fully retroactive in their application. See *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965) (BLACK, J., dissenting). I am thus glad to see that the majority has apparently decided to apply constitutional decisions retroactively even when they do not affect the "integrity of the fact-finding process," see *id.*, at 639, and will greatly burden the administration of justice, see *Desist* v. *United States*, 394 U. S. 244, 250 (1969).

was by its own facts, and convictions should remain final unless a petitioner seeking habeas corpus alleges that he can currently show he was innocent. There is not even a suspicion here that this hardened criminal is innocent and I would let him stay in confinement to serve his sentence.

MR. JUSTICE BLACKMUN agrees with much that is said by MR. JUSTICE BLACK and also dissents from the opinion and judgment of the Court.

UNITED TRANSPORTATION UNION *v.* STATE BAR OF MICHIGAN

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 434. Argued January 20, 1971—Decided April 5, 1971

Respondent brought this action to enjoin the Brotherhood of Railroad Trainmen (later merged into petitioner) from engaging in group legal activity for the stated purpose of assisting workers in filing damage suits under the Federal Employers' Liability Act (FELA). Respondent charged that the Union had recommended to its Michigan members selected Chicago attorneys whose fees would not exceed 25% of the amount recovered. The Union's answer admitted, *inter alia*, that it had engaged in the practice of protecting its members against large fees and incompetent counsel and that Union members were reimbursed for transporting injured members to the legal counsel's offices. On the basis of the pleadings and one witness' testimony that a large number of Michigan FELA claimants were represented by the Union's Chicago counsel, the trial court issued an injunction. While that decision was on appeal, this Court decided *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U. S. 1, and the Michigan Supreme Court thereafter remanded the case to the trial court for further consideration. Following respondent's motion for judgment, that court, adopting the decree entered against the Union in *Trainmen* after this Court's remand, enjoined the Union from "giving or furnishing legal advice to its members or their families"; furnishing attorneys the names of injured members or information relating to their injuries; accepting compensation for the solicitation of legal employment for any lawyer; and from controlling the lawyer's fees. The Michigan Supreme Court affirmed. *Held:* The injunction issued against the Union in this case violated its right under the First and Fourteenth Amendments to engage in group activity to enable its members to meet the costs of legal representation and otherwise to secure meaningful access to the courts, *Trainmen, supra; United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217; *NAACP* v. *Button*, 371 U. S. 415. Pp. 579–586.

383 Mich. 201, 174 N. W. 2d 811, reversed.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. HARLAN,

J., filed an opinion concurring in part and dissenting in part, *post*, p. 586. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 600. STEWART, J., took no part in the decision of the case.

John J. Naughton argued the cause and filed a brief for petitioner.

A. D. Ruegsegger argued the cause for respondent. With him on the brief were *Phillip C. Kelly* and *Louis Rosenzweig.*

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Michigan State Bar brought this action in January 1959 to enjoin the members of the Brotherhood of Railroad Trainmen [1] from engaging in activities undertaken for the stated purpose of assisting their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.[2] The complaint charged, as factors relevant to the cause of action, that the Union recommended selected attorneys to its members and their families, that it secured a commitment from those attorneys that the maximum fee charged would not exceed 25% of the recovery, and that it recommended Chicago lawyers to represent Michigan claimants. The State Bar's complaint appears to be a plea for court protection of un-

[1] On January 1, 1969, after the decree was entered in the court below, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union. The successor union is the petitioner in this case.

[2] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.

limited legal fees. The Union's answers admitted that it had engaged in the practice of protecting members against large fees and incompetent counsel; that since 1930 it had recommended, with respect to FELA claims, that injured member employees, and their families, consult attorneys designated by the Union as "Legal Counsel"; that prior to March 1959, it had informed the injured members and their families that the legal counsel would not charge in excess of 25% of any recovery; and that Union representatives were reimbursed for transporting injured employees, or their families, to the legal counsel offices.

The only evidence introduced in this case was the testimony of one employee of the Association of American Railroads in 1961 that from 1953 through 1960 a large number of Michigan FELA claimants were represented by the Union's designated Chicago legal counsel. Based on this evidence and the Union's admissions set out above, the state trial court in 1962 issued an order enjoining the Union's activities on the ground that they violated the state statute making it a misdemeanor to "solicit" damage suits against railroads.[3] The Union appealed to the Michigan Supreme Court, but before the case was argued on appeal, this Court handed down its decision in *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U. S. 1 (1964), involving a similar injunction secured by the Virginia State Bar against the Union. We held in that case that the First Amendment guarantees of free speech, petition, and assembly give

[3] Section 750.410, Mich. Comp. Laws (1948), in relevant part provides:

"Any person . . . or organization of any kind, either incorporated or unincorporated . . . who shall directly or indirectly . . . solicit any person injured as the result of an accident . . . for the purpose of representing such person in making claim for damages . . . shall be guilty of a misdemeanor . . . ."

railroad workers the right to cooperate in helping and advising one another in asserting their rights under the FELA. While not deciding every question that possibly could be raised, our opinion left no doubt that workers have a right under the First Amendment to act collectively to secure good, honest lawyers to assert their claims against railroads.

Acknowledging our decision in *Trainmen*, the Michigan Supreme Court remanded the instant case to the state trial court with permission for amendment of the complaint "to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." 374 Mich. 152, 155, 132 N. W. 2d 78, 79. After remand, the State Bar made a motion for further proceedings. That motion was heard on February 5, 1965, at which time the Bar declined to amend its complaint. For reasons not explained in the record, the case lingered in the trial court until May 24, 1968. On that date, after a motion for judgment by the State Bar and arguments on the motion, the trial court adopted verbatim the injunction entered in the Virginia state courts after our remand in *Trainmen*.

In affirming the trial court decree, the material part of which is set out below,[4] the Michigan Supreme Court gave our holding in *Trainmen* the narrowest possible

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[4] The decree entered by the Michigan trial court permanently restrained and enjoined the Union:

"from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or

reading,[5] focusing only on the specific literal language of the injunctive provisions challenged in that case rather than the broad range of union activities held to be protected by the First Amendment. Similarly, the Michigan court erroneously restricted our holding in *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967), to "the operative portion" of the Illinois decree prohibiting any financial connection between the attorney and the Union. The Michigan Supreme Court failed to follow our decisions in *Trainmen*, *United Mine Workers*, and *NAACP* v. *Button*, 371 U. S. 415 (1963), upholding the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable. When applied, as it must be, to the Union's activities reflected in the record of this case, the First Amendment forbids the restraints imposed by the injunction here under review for the following among other reasons.

First. The decree approved by the Michigan Supreme Court enjoins the Union from "giving or furnishing legal advice to its members or their families." Given its broadest meaning, this provision would bar the Union's members, officers, agents, or attorneys from giving any kind of advice or counsel to an injured worker or his family concerning his FELA claim. In *Trainmen* we upheld the commonsense proposition that such activity is protected by the First Amendment. Moreover, the

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to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."

[5] 383 Mich. 201, 174 N. W. 2d 811.

plain meaning of this particular injunctive provision would emphatically deny the right of the Union to employ counsel to represent its members, a right explicitly upheld in *United Mine Workers* [6] and *NAACP* v. *Button*.

We cannot accept the restricted interpretation of this provision urged by the State Bar, and accepted by our Brother HARLAN, that it only prohibits the Union or its members themselves from "practicing law." The record is devoid of any evidence or allegation of such conduct on the part of the Union or its members. A decree must relate specifically and exclusively to the pleadings and proof. If not so related, the provision, because of its vagueness, will jeopardize the exercise of protected freedoms. This injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down. Our statement in *NAACP* v. *Button* concerning the statute there in question is equally applicable to the injunction now before us: "[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." 371 U. S., at 438.

Second. The decree also enjoins the Union from furnishing to any attorney the names of injured members or information relating to their injuries. The investigation of accidents by Union staff for purposes of gathering evidence to assist the injured worker or his family in asserting FELA claims was part of the Union practice

[6] The decree overturned in *United Mine Workers* also enjoined the union from: "Giving legal counsel and advice." 389 U. S., at 218 n. 1. It was conceded in that case that the provision was directed at the Union's employment of an attorney.

upheld in *Trainmen*. 377 U. S., at 4 n. 8. It would seem at least a little strange now to hold that the Union cannot communicate that information to the injured member's attorney.[7]

Third. A provision of the decree enjoins the members of the Union from "accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise." The Union conceded that prior to 1959, Union representatives were reimbursed for their actual time spent and out-of-pocket expenses incurred in bringing injured members or their families to the offices of the legal counsel. Since the members of a union have a First Amendment right to help and advise each other in securing effective legal representation, there can be no doubt that transportation of injured members to an attorney's office is within the scope of that protected activity. To the extent that

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[7] Our Brother HARLAN suggests that the injured member should be free to direct the collected information to whatever lawyer he chooses, rather than for the Union to give it to the Union's recommended legal counsel. However, the injunction prohibits the Union from furnishing the information to "any lawyer," apparently including both recommended and nonrecommended counsel alike. The injunction would prohibit the injured member's attorney, regardless of whether or not he was recommended by the Union, from communicating with the Union's representative who investigated the accident, is familiar with the facts, and, other than the injured member himself, is probably the person most qualified to answer the attorney's questions and assist in preparation of the claim. To satisfy the Michigan court's notion that direct communication between the Union and the member's attorney is somehow unlawful, it seems our Brother HARLAN would restrict the Union's efforts, which we expressly approved in *Trainmen*, of assisting the injured member in preparing his case for trial, to a written accident report filed with the injured member.

the injunction prohibits this practice, it is invalid under *Trainmen, United Mine Workers,* and *NAACP* v. *Button.*

Fourth. Our Brothers HARLAN and WHITE apparently accept the State Bar contention that the provision prohibiting compensation to Union representatives for solicitation refers to compensation paid by the attorney rather than the Union. And so interpreted, it supplements the two provisions which prohibit the Union from sharing in legal fees received by the recommended counsel. There is no basis for this restraint. Such activity is not even suggested in the complaint. There is not a line of evidence concerning such practice in the record in this case. If there is any such suggestion, it is in records in other cases involving other parties in other courts, records upon which we believe our Brother HARLAN erroneously seeks to rely. In fact, the explanation for the appearance of the provisions in this decree appears to be the Michigan court's verbatim adoption of a Virginia injunction issued in a different case on different pleadings relating to different facts. Decrees between litigants should not rest on any such unsupportable basis as this.

Our Brother HARLAN appears to concede that the State Bar has neither alleged nor proved that the Union has engaged in the past, is presently engaging, or plans to engage, in the sharing of legal fees. Nonetheless, he suggests that the injunction against such conduct is justified in order to remove any "temptation" for the Union to participate in such activities. We cannot accept this novel concept of equity jurisdiction that would open the courts to claims for injunctions against "temptation," and would deem potential "temptation" to be a sufficient basis for the issuance of an injunction. Indeed, it would appear that jurisdiction over "temptation" has heretofore been reserved to the churches.

An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct. In *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 262 (1917), this Court struck the portions of a decree enjoining a union from picketing and physical violence because there was no evidence that either of these forms of interference was threatened.[8] Likewise in the present case, with respect to the prohibition against sharing legal fees, the State Bar simply has made no showing that such conduct was threatened. Indeed, it has made no showing at all. Therefore, that provision of the decree, to use an often quoted slogan, would appear to be not only unjustified, but also "arbitrary and capricious."

Fifth. Finally, the challenged decree bars the Union from controlling, directly or indirectly, the fees charged by any lawyer. The complaint alleged that the Union sought to protect its members from excessive legal fees by securing an agreement from the counsel it recommends that the fee will not exceed 25% of the recovery, and that the percentage will include all expenses incidental to investigation and litigation. The Union in its answer admitted that prior to 1959 it secured such agreements for the protection of its members.

United Mine Workers upheld the right of workers to act collectively to obtain affordable and effective legal representation. One of the abuses sought to be remedied by the Mine Workers' plan was the situation pursuant to which members "were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees." 389 U. S., at 219. The Mine

[8] Mr. Justice Brandeis dissented on the ground that this principle should have been applied to strike the other provisions of the injunction as well. 245 U. S., at 263 (Brandeis, J., dissenting).

Workers dealt with the problem by employing an attorney on a salary basis, thereby providing free legal representation for its members in asserting their claims before the state workmen's compensation board. The Union in the instant case sought to protect its members against the same abuse by limiting the fee charged by recommended attorneys. It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel. Indeed, the Michigan court was foreclosed from so doing by our decision in *United Mine Workers.*[9]

In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP* v. *Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or

[9] The injunction also bars the Union "from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." The only allegation in the complaint possibly relating to this injunctive provision is that the Union representatives informed the injured members that the 25% fee included all expenses. This provision of the injunction, therefore, is invalid for the same reasons that the provision limiting fees is invalid.

others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen,* and *NAACP* v. *Button.* The injunction in the present case cannot stand in the face of these prior decisions.

Reversed.

MR. JUSTICE STEWART took no part in the decision of this case.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court's conclusions with respect to the issues presented by the case at bar are, in my view, flawed by the absence of any examination of the relationship between this case and the substantially contemporaneous proceedings in Illinois and Virginia against the same union with respect to the same charges of unprofessional conduct in the Brotherhood's "Legal Aid Department."

I

The history of the establishment of the Legal Aid Department and the early attacks upon it by state and local bar associations, with the assistance and encouragement of the Association of American Railroads, has been fully recounted elsewhere. See Bodle, Group Legal Services: The Case for *BRT,* 12 U. C. L. A. L. Rev. 306, 307–317 (1965); Note, 50 Cornell L. Q. 344 (1965). The most significant point in this history, for present purposes, came in the late 1950's. With disciplinary proceedings pending against its Regional Counsel in Chicago,[1] the Brotherhood counterattacked by moving in the Supreme Court of Illinois for a declaration that the Brotherhood's plan was both legal and compatible with the minimum

[1] The Chicago Regional Counsel had jurisdiction over the lower peninsula of Michigan, where this lawsuit was brought. App. 14.

standards of professional conduct. After hearings before a special commissioner, the Illinois court found that the basic facts with respect to the operation of the Legal Aid Department were not seriously disputed:

> "As it presently operates, the legal aid department of the Brotherhood maintains a central office in Cleveland, Ohio, at the national headquarters of the Brotherhood. In that office it has a staff consisting of a chief clerk, a research analyst, three stenographers and a file clerk. It also has a number of regional investigators. The Cleveland office serves as a clearing house which receives reports from all Brotherhood Lodges of instances in which members have been injured or killed in railroad accidents. It notifies the appropriate regional investigator and regional counsel of all accidents.
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> "By agreement with the Brotherhood the attorneys who are designated as regional counsel charge a fee of twenty-five per cent of the amount recovered in each case, whether recovery is by settlement or by judgment. Regional counsel have also agreed to and do pay all court costs, investigation costs, costs of doctors' examinations, expert witness fees, transcript costs and the cost of printing briefs on appeal. They also pay the total cost of operating the legal aid department of the union [including the department's ratable share of the expenses of the Brotherhood's conventions]. All expenses of the legal aid department are apportioned among the sixteen regional counsel in the ratio that their respective gross fees bear to the total gross recoveries throughout the country. . . .
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> "The Brotherhood constitution requires that each local lodge appoint someone whose duty it is to fill out an accident report whenever a member is in-

jured, and also to make contact with the injured man, or the relatives of a man who is killed, and make it known that legal advice will be given free of charge by the regional counsel. He also makes known the availability of regional counsel to handle the claim and any ensuing litigation for a total charge of twenty-five per cent of the amount recovered by settlement or by litigation. The twenty-five per cent includes all expenses of investigation and litigation.

"The lodge member who investigates the occurrence and makes contact with the injured man recommends and urges that regional counsel be consulted and employed. These men carry blank copies of contracts employing the regional counsel's firm as attorneys. The regional investigators employed by the legal aid department also carry these contracts. If a signed contract is not obtained by an investigator in the field, an investigator often brings the interested parties to the office of the regional counsel in Chicago. The injured man may be accompanied by his wife, and if the interested party is a widow, the wife of the investigator also makes the trip. The expenses of these trips are paid immediately by regional counsel. The lodge member who investigates and urges the employment of regional counsel is also compensated by regional counsel at his regular hourly wage rate for time spent in investigating the case and in making the trip to Chicago. These amounts are paid whether or not the regional counsel is retained, and regardless of the ultimate outcome. In addition [the regional counsel in Chicago] testified, 'There are many times when one of the boys will bring in a case, and taking care of the investigation, etc., they are

given a gratuity of $100 or $150.'" *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 392–395, 150 N. E. 2d 163, 165–166 (1958).

On the basis of the facts thus found, the court laid down the following guidelines to indicate to the Brotherhood what it could and could not do in connection with personal injury and wrongful death claims with respect to its members:

"We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood.

"The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully. Its employees, however, may not carry contracts for the employment of any lawyer, or photostats of settlement checks. No financial connection of any kind between the Brotherhood and any lawyer is permissible. No lawyer can properly pay any amount whatsoever to the Brotherhood or any of its departments, officers or members as compensation, reimbursement of expenses or gratuity in connection with the procurement of a case. Nor can the Brotherhood fix the fees to be charged for services to its members. The relationship of the

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> attorney to his client must remain an individual and a personal one.
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> "The course thus outlined, if adopted, will make it possible for the Brotherhood to achieve its legitimate objectives without tearing down the standards of the legal profession." *Id.*, at 397–398, 150 N. E. 2d, at 167–168.

The court gave the Brotherhood over a year, until July 1, 1959, to bring itself into compliance with these standards. *Id.*, at 399, 150 N. E. 2d, at 168.

The decree thus rendered appeared to satisfy both the Brotherhood and the Bar. See Note, 50 Cornell L. Q. 344, 348 and n. 32 (1965); Bodle, Group Legal Services: The Case for *BRT*, 12 U. C. L. A. L. Rev. 306, 317 (1965). By letter dated March 16, 1959, the president of the Brotherhood directed all legal counsel "to live up to said opinion in its entirety" on pain of being removed from office and reported to the local bar association. The letter also announced that "[t]he Brotherhood will finance its Legal Aid Department, and will investigate accidents so that it will be acquainted with the cause of said accidents, and by so doing will be able to remedy any violation of the Federal Employers' Liability Act and the Safety Appliance Act. The result of such investigation shall be made available only to the injured person." App. 16–17. The opinion of the Illinois court and the letter of the BRT president directing compliance therewith became the basis for consent judgments in Nebraska,[2] Missouri,[3] and several other States.[4]

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[2] *State ex rel. Beck* v. *Lush*, 170 Neb. 376, 103 N. W. 2d 136 (1960).

[3] *Hulse* v. *Brotherhood of Railroad Trainmen*, 340 S. W. 2d 404 (Mo. 1960).

[4] Initially it appeared that a consent decree might be entered in the Michigan proceedings, but this possibility never eventuated. App. 30–31.

The Virginia Bar, however, was not content with the anti-solicitation measures ordered by the Illinois court,[5] and it pressed for and obtained a more sweeping decree. That decree, as originally entered, restrained the Brotherhood

> "[1] from giving or furnishing legal advice to its members or their families; [2] from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; [3] from informing any lawyer that an accident has occurred and furnishing the name and address of an injured or deceased member for the purpose of obtaining legal employment for such lawyer; [4] or in any other manner soliciting or encouraging such legal employment of the selected lawyers; [5] from stating or suggesting that such selected lawyers will defray expenses and make advances to clients pending settlement of claims; [6] from controlling, directly or indirectly, fees charged or to be charged by any lawyer; [7] from making compensation for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; [8] from in any manner sharing in the legal fees of any lawyer, or countenancing the splitting of such fees with any layman or lay agency; [9] and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers; [10] and, in general, from violating the laws govern-

[5] See the testimony of petitioner's president during pretrial proceedings in the Virginia case that "[i]f we thought for a moment" that a consent decree along the lines of the Illinois opinion would be acceptable "we would make it effective tomorrow." App. 91, *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

> ing the practice of law in the Commonwealth of Virginia." *Brotherhood of Railroad Trainmen* v. *Commonwealth ex rel. Virginia State Bar*, 207 Va. 182, 184 n. 1, 149 S. E. 2d 265, 266–267, n. 1 (1966) (numbers have been inserted for convenient reference).

The Brotherhood sought and obtained review by this Court, limiting its attack to the provisions numbered (2), (4), and (9) above. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 4–5 (1964). This was apparently the result of a tactical decision, for it enabled the Brotherhood to argue that it had acquiesced in the restraints imposed on its activities by the Illinois Supreme Court, which that court had held were adequate to protect the ethics of the legal profession and the public interest.[6] The Brotherhood therefore could take the position that it contested the Virginia decree only because "the [Virginia] Bar sought a more restrictive injunction than the Illinois opinion suggested." Reply Brief 29, *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, No. 34, O. T. 1963.

This Court accepted the Brotherhood's contentions and reversed. On remand, the Virginia courts deleted the

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[6] The Court acknowledged this limitation on the Brotherhood's contentions:

"Certain other provisions of the decree enjoin the Brotherhood from sharing counsel fees with lawyers whom it recommended and from countenancing the sharing of fees by its regional investigators. The Brotherhood denies that it has engaged in such practices since 1959, in compliance with a decree of the Supreme Court of Illinois. See *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163. Since the Brotherhood is not objecting to the other provisions of the decree except insofar as they might later be construed as barring the Brotherhood from helping injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood, it is only to that extent that we pass upon the validity of the other provisions." 377 U. S., at 5 n. 9.

provisions struck down by this Court, replaced provision (10) with a prohibition on "sharing in any recovery for personal injury or death by gift, assignment or otherwise," altered the wording of the remaining provisions in minor respects, and upheld the modified decree as consistent with this Court's mandate. 207 Va. 182, 149 S. E. 2d 265 (1966). The Brotherhood did not seek review of this decision, and it became final in due course.

II

Given this background, with which counsel below and the trial judge were generally familiar, the proceedings now under review appear in a substantially different posture. The State Bar's complaint charged unlawful solicitation of business. The Brotherhood's answer, after admitting the charges in some respects and denying them in others, set up the Illinois Supreme Court opinion as an affirmative defense, noting that the Michigan State Bar had been aware of that proceeding and had assisted in it, although it was not formally a party. The answer observed that the Illinois court had declared certain features of the Brotherhood's activities lawful and other features unlawful and directed the discontinuance of the latter. The answer then averred that after the filing of the Michigan complaint the Brotherhood had brought itself into compliance with the Illinois opinion. The answer quoted the above-mentioned letter from the Brotherhood's president as proof. On this basis, the Brotherhood contended that the conduct complained of either was permissible or had terminated, so that the bill should be dismissed for want of equity and for mootness. App. 15–17.

In its reply the State Bar specifically relied on the Brotherhood's admissions in the Illinois proceedings and the findings of the Illinois court as working an estoppel of the defendants with respect to at least some of the matters

there in issue. App. 20–24.[7] However, the reply leaves unclear just what the Bar considered to be involved in the Michigan lawsuit. It described the Michigan Bar's cause of action as both broader and narrower than the Illinois lawsuit. App. 23–24. The next pleading filed, a "Statement of Claim," did little to clarify matters. It referred only to the Brotherhood's scheme of solicitation of legal business, but included allegations that as part of the scheme regional counsel made payments to the Brotherhood and to regional investigators and also contributed to the financial support of clients during the pendency of litigation. App. 29.

The trial judge apparently sought to clear up the confusion as to just what was in issue by including in the pretrial summary a provision that "[i]n the event there is not a consent decree, defendants have been requested to advise what issue in Michigan is different than in the other states where consent decrees have entered." App. 30. There is nothing in the record to indicate that the defendants responded to this request in a way designed to limit the issues to solicitation.

After the initial hearing in this case the trial judge entered a decree that *inter alia* prohibited the Brotherhood from "[e]ngaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in In re Brotherhood of Railroad Trainmen." App. 117. In this connection he observed that "although certain specific activities and conduct as contained in the Illinois decision were not specifically pleaded in the instant suit, nevertheless, by the defendants' answer, they have been indirectly injected into this litigation and should be covered by the Court's order." App. 112. Inasmuch as the activi-

[7] The reply also referred in passing to actions in courts of other States where the Brotherhood has been condemned for engaging in "the same or similar practices as those at issue in this cause." App. 24.

ties referred to, see *supra*, at 587–589, were directly related to the solicitation charged in the State Bar's complaint, I consider this decision by the judge to be entirely justifiable.

While it is unfortunate that the record is as stale as it is, there is ample evidence to indicate that the Brotherhood's conduct, at least as of the time the bill of complaint was filed, was of such a character as to call for the decree before us. The Brotherhood, despite its repeated allegations that the objectionable features of this conduct ceased in April 1959, failed to introduce any proof to that effect during the evidentiary hearing in 1961. In the 1965 and 1968 proceedings on remand from the Michigan Supreme Court, the Brotherhood did not request a reopening of the record, or even assert that there had been any significant change in factual circumstances since the original proceedings. Moreover, Michigan law provides for modification of a continuing injunction upon a proper showing of changed circumstances. See *First Protestant Reformed Church* v. *DeWolf*, 358 Mich. 489, 495, 100 N. W. 2d 254, 257 (1960) (dictum), citing *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932). With matters in this posture, I am content to pass on the validity of the decree despite the state of the record.

III

I agree that, in light of this Court's recent decisions, one portion of the Michigan decree—that prohibiting the union from controlling the fees charged by attorneys—cannot stand. In *United Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967), the Court held that as a matter of federal constitutional law a labor union is entitled to engage an attorney to represent its members in matters of collective interest, free of direct financial charge to them. While I believed then and still believe that this was an unsound piece of constitutional adjudi-

cation, I am unable to distinguish the facts of *Mine Workers* from those in the case at bar, where a union agreed with attorneys as to the maximum fee to be charged its members in matters of collective interest. Despite the Brotherhood's prior acquiescence in the decrees in Virginia and other States, I find the unforeseeable change in the law wrought by the *Mine Workers* decision sufficient to justify relieving it from the consequences of taking that position. See Restatement of Judgments § 70 (1942); 1B J. Moore, Federal Practice ¶ 0.448 (1965). I therefore concur in the Court's vacating this portion of the Michigan decree. In all other respects I think the decree is consistent with our past decisions and otherwise valid.

The first portion of that decree prohibits the Brotherhood from "giving or furnishing legal advice to its members or their families." I do not understand that the Court's "commonsense" approach to the First Amendment extends to the point that laymen are constitutionally entitled to give legal advice to other laymen. I think it plain that the provision was intended to prohibit *only* such conduct. It is manifestly based on the Virginia decree, where the corresponding provision was supported by the chancellor's finding that "[i]n furtherance of the plan the defendant Brotherhood has advised, and continues to advise, its members and the families of deceased members with respect to the legal aspects of their claims." 207 Va., at 183 n. 1, 149 S. E. 2d, at 266 n. 1. The provision is also related to the prohibition in the 1962 Michigan decree against "[t]elling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan." App. 117. I therefore can only consider fanciful the Court's suggestion that the "plain meaning" of this prohibition "would

emphatically deny the right of the Union to employ counsel to represent its members." *Ante,* at 581. In any event, if there is any ambiguity in the decree the appropriate course is to clarify it, not to strike it down.

The second provision of the decree, prohibiting the Brotherhood from furnishing attorneys with information about accidents and the names and addresses of injured workers, orders it to refrain from conduct that it averred but did not prove had been terminated. Nothing in our prior decisions approves the solicitation of business by lawyers except insofar as the solicitation may be correlative to the rights of the clients. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U. S., at 8. There is no reason in terms of First Amendment interests why the Brotherhood should not be obliged to give the results of its investigations to the injured person to take to whatever lawyer he chooses rather than for the Brotherhood to give it to the lawyer it prefers. The provision is plainly appropriate as a means of ensuring that the injured workman has a truly free choice. In effect this provision of the decree is designed to fend against "ambulance chasing," an activity that I can hardly suppose the Court thinks is protected by the First Amendment.

Another provision of the decree prohibits the Brotherhood and its members from "stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." I think it a close question whether the conduct thus proscribed is protected under this Court's opinion in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar, supra.* As petitioner admits, while it is not generally improper for an attorney to make advances to clients, it is considered improper for him to use the fact that he makes them as a drawing card

in an effort to secure professional employment. At the same time, there is no contention made that the representation thus proscribed is inaccurate, and misapprehension on this score may well be the determinative factor in an injured man's decision not to seek legal advice in connection with his claim. On balance, I conclude that the equities do not call for relieving petitioner of its considered decision to acquiesce in this portion of the Virginia decree and the corresponding portions of consent decrees entered in other States.

The remaining provisions of the decree prohibit the Brotherhood from sharing in legal fees or recoveries, and prohibit the members from accepting compensation for solicitation of business for a lawyer. These provisions are entirely appropriate to remove any temptation for the representatives of the Brotherhood to overbear the injured man's choice of legal representation. They prohibit conduct which has long been considered unethical, and which in no significant way advances the interests that the Court's prior decisions in this field sought to protect. I see no basis whatever for striking down these provisions of the decree.[8]

[8] The Brotherhood explicitly admitted in its answer that its members had in the past received compensation from regional counsel for services in furnishing clients, App. 17, and the opinion of the Illinois Supreme Court, on which the Brotherhood relied, detailed the manner in which regional counsel were required to support the Brotherhood's Legal Aid Department. See *supra*, at 587. This scheme was the end product of an evolution from more direct forms of fee splitting, a process described in *Hulse* v. *Brotherhood of Railroad Trainmen*, 340 S. W. 2d 404, 408–409 (Mo. 1960). The court below, having found the evil in a matured form, was entitled to proscribe as well the straightforward manifestation in which it had begun. Moreover, it is well settled that a court of equity, like an administrative agency, "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC* v. *Ruberoid*

For these reasons I would sustain the judgment of the Michigan Supreme Court, with the exception already noted for the prohibition on controlling the fees charged by any lawyer. However, it is appropriate for me to make a few general remarks in closing. I share my Brothers' concern with the problems of providing meaningful access to competent legal advice for persons in the middle and lower economic strata of our society. This is a matter of public concern deserving our best efforts at resolution, a task that the organized bar may be thought to have been too slow in recognizing. Nor do I condone, any more than my Brethren, the nefarious practices that called forth the Brotherhood's plan before us today.

But the issue presented for decision is not the desirability of group legal services, or the ways in which the traditional concepts of professional ethics should be modified to take account of the changes in social structure and social needs since the 19th century. The issue, rather, is the scope left by the Federal Constitution for state action in the regulation of the practice of law. Despite the First Amendment implications of denial of access to the courts in other situations, see *NAACP* v. *Button*, 371 U. S. 415, 452–455 (1963) (dissenting opinion), all that is involved here is a combination of purchasers of services seeking to increase their market power. The relationship to First Amendment interests seems to me remote at best. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 19–20 (1945). Recognizing that a majority of my Brethren felt otherwise in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), and *United Mine Workers* v. *Illinois Bar*

Co., 343 U. S. 470, 473 (1952) (footnote omitted). See, *e. g.*, *Local 167* v. *United States*, 291 U. S. 293 (1934); *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

Assn., 389 U. S. 217 (1967), I accept their conclusion. I would not, however, extend those cases further than is required by their logic. Accordingly, with the one exception noted, I would affirm the judgment below.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

The first provision in the decree prohibiting the union from giving or furnishing legal advice to its members or their families is overbroad in light of *United Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967), and should be narrowed to prohibit only legal advice by nonlawyers. Also, I agree with the Court that the portion of the decree forbidding the setting of fees by union-lawyer agreement cannot stand. Otherwise, however, I do not read the decree as being inconsistent with our prior cases and I would not now extend them to set aside this decree in its entirety.

Syllabus

UNITED STATES *v.* FREED ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 345. Argued January 11, 1971—Decided April 5, 1971

In *Haynes* v. *United States*, 390 U. S. 85, the Court held invalid under the Self-Incrimination Clause of the Fifth Amendment provisions of the National Firearms Act, which constituted parts of an interrelated statutory scheme for taxing certain classes of firearms primarily used for unlawful purposes, and made the potentially incriminating information available to state and other officials. To eliminate the defects revealed by *Haynes*, Congress amended the Act so that only a possessor who lawfully makes, manufactures, or imports firearms can and must register them. The transferor must identify himself, describe the firearm, and give the name and address of the transferee, whose application must be supported by fingerprints and a photograph and a law enforcement official's certificate identifying them as those of the transferee and stating that the weapon is intended for lawful uses. Only after the transferor's receipt of the approved application form may the firearm transfer be legally made. A transferee does not and cannot register, though possession of an unregistered firearm is illegal. No information or evidence furnished under the Act can be used as evidence against a registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence," and no information filed is, as a matter of administration, disclosed to other federal, local, or state agencies. Appellees, who had been indicted under the amended Act for possessing and conspiring to possess unregistered hand grenades, filed motions to dismiss, which the District Court granted on the ground that the amended Act, like its predecessor, compels self-incrimination and that the indictment contravenes due process requirements by failing to allege scienter. Appellees also contend that the provisions relating to fingerprints and photographs will cause future incrimination. *Held:*

1. The revised statutory scheme of the amended Act, which significantly alters the scheme presented in *Haynes*, does not involve any violation of the Self-Incrimination Clause of the Fifth Amendment. Pp. 605–607.

2. The amended Act fully protects a person against incrimination for past or present violations, and creates no substantial hazards of future incrimination. P. 606.

3. The amended Act's prohibition against a person's "receiv[ing] or possess[ing] a firearm which is not registered to him," requires no specific intent and the absence of such a requirement in this essentially regulatory statute in the area of public safety does not violate due process requirements either as respects the substantive count or the conspiracy count. Pp. 607–610.

Reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN (as to Part I), STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 610.

Matthew J. Zinn argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Peter L. Strauss, Beatrice Rosenberg,* and *Mervyn Hamburg.*

Luke McKissack argued the cause and filed a brief for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Following our decision in *Haynes* v. *United States,* 390 U. S. 85, Congress revised the National Firearms Act with the view of eliminating the defects in it which were revealed in *Haynes.*[1]

At the time of *Haynes* "only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." *Id.,* at 87. Under the Act, as amended, all possessors of firearms as defined in the Act [2]

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[1] See S. Rep. No. 1501, 90th Cong., 2d Sess., 26, 42, 48, 52; H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 35.

[2] 26 U. S. C. § 5845 (f) (1964 ed., Supp. V) defines "destructive device" to include "grenades" which are involved in the present case.

are covered, except the Federal Government. 26 U. S. C. § 5841 (1964 ed., Supp. V).

At the time of *Haynes* any possessor of a weapon included in the Act was compelled to disclose the fact of his possession by registration at any time he had acquired possession, a provision which we held meant that a possessor must furnish potentially incriminating information which the Federal Government made available to state, local, and other federal officials. *Id.*, at 95–100. Under the present Act [3] only possessors who lawfully

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[3] Title 26 U. S. C. § 5812 (a) (1964 ed., Supp. V) provides:

"A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."

Title 26 U. S. C. § 5812 (b) (1964 ed., Supp. V) provides:

"The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section."

Title 26 U. S. C. § 5841 (b) (1964 ed., Supp. V) provides:

"Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor."

make, manufacture, or import firerams can and must register them; *the transferee does not and cannot register.* It is, however, unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."[4]

At the time of *Haynes,* as already noted, there was a provision for sharing the registration and transfer information with other law enforcement officials. *Id.,* at 97–100. The revised statute explicitly states that no information or evidence provided in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."[5] The scope of the privilege extends, of course, to the hazards of prosecution under state law for the same or similar offenses. See *Malloy* v. *Hogan,* 378 U. S. 1; *Marchetti* v. *United States,* 390 U. S. 39, 54. And the appellees, apparently fearful that the Act as written does not undertake to bar the use of federal filings in state prosecutions, urge that those risks are real in this case. It is said that California statutes[6] punish the possession of grenades and that federal registration will incriminate appellees under that law.

The Solicitor General, however, represents to us that *no information filed* is as a matter of practice disclosed to any law enforcement authority, except as the fact of nonregistration may be necessary to an investigation or prosecution under the present Act.

The District Court nonetheless granted the motion to dismiss on two grounds: (1) the amended Act, like the

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[4] 26 U. S. C. § 5861 (d) (1964 ed., Supp. V).

[5] 26 U. S. C. § 5848 (1964 ed., Supp. V); and see 26 CFR § 179.202.

[6] Penal Code § 12303 (1970).

version in *Haynes*, violates the Self-Incrimination Clause of the Fifth Amendment; and (2) the conspiracy "to possess destructive devices" and the possession charged do not allege the element of scienter. The case is here on direct appeal. 18 U. S. C. § 3731. And see *United States* v. *Spector*, 343 U. S. 169; *United States* v. *Nardello*, 393 U. S. 286.

I

We conclude that the amended Act does not violate the Self-Incrimination Clause of the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself." As noted, a lawful transfer of a firearm may be accomplished only if it is already registered. The transferor—not the transferee—does the registering. The transferor pays the transfer tax and receives a stamp [7] denoting payment which he affixes to the application submitted to the Internal Revenue Service. The transferor must identify himself, describe the firearm to be transferred, and the name and address of the transferee. In addition, the application must be supported by the photograph and fingerprints of the transferee and by a certificate of a local or federal law enforcement official that he is satisfied that the photograph and fingerprints are those of the transferee and that the weapon is intended for lawful uses.[8] Only after receipt of the approved application form is it lawful for the transferor to hand the firearm over to the transferee. At that time he is to give the approved application to the transferee.[9] As noted, the Solicitor General advises us that the information in the hands of Internal Revenue Service, as a matter of practice, is not available to state or other federal authorities

[7] 26 U. S. C. § 5811 (1964 ed., Supp. V).

[8] 26 U. S. C. § 5812 (a) (1964 ed., Supp. V); 26 CFR §§ 179.98–179.99.

[9] 26 CFR § 179.100.

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and, as a matter of law, cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law.[10]

The transferor—not the transferee—makes any incriminating statements. True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the lawful, not the unlawful, possessor of the firearm. Indeed, the only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The argument, however, is that furnishing the photograph and fingerprints will incriminate the transferee in the future. But the claimant is not confronted by "substantial and 'real' " but merely "trifling or imaginary hazards of incrimination"—*first* by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and *second* by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies. *Marchetti* v. *United States, supra,* at 53–54. Cf. *Minor* v. *United States,* 396 U. S. 87, 94. Since the state and other federal agencies never see the information, he is left in the same position as if he had not given it, but "had claimed his privilege in the absence of a . . . grant of immunity." *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 79. This, combined with the protection against use to prove prior or concurrent offenses, satisfies the Fifth Amendment requirements respecting self-incrimination.[11]

Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which pro-

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[10] 26 U. S. C. § 5848 (1964 ed., Supp. V); 26 CFR § 179.202.

[11] We do not reach the question of "use immunity" as opposed to "transactional immunity," cf. *Piccirillo* v. *New York,* 400 U. S. 548, but only hold that, under this statutory scheme, the hazards of self-incrimination are not real.

tects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

Another argument goes to the question of entrapment. But that is an issue for the trial, not for a motion to dismiss.

II

We also conclude that the District Court erred in dismissing the indictment for absence of an allegation of scienter.

The Act requires no specific intent or knowledge that the hand grenades were unregistered. It makes it unlawful for any person "to receive or possess a firearm which is not registered to him." [12] By the lower court decisions at the time that requirement was written into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. See *Sipes* v. *United States*, 321 F. 2d 174, 179, and cases cited.

The presence of a "vicious will" or *mens rea* (*Morissette* v. *United States*, 342 U. S. 246, 251) was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare. *Id.*, at 254. The statutory offense of embezzlement, borrowed from the common law where scienter was historically required, was in a different category.[13] *Id.*, at 260–261.

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and mean-

[12] 26 U. S. C. § 5861 (d) (1964 ed., Supp. V).

[13] As respects the *Morissette* case, J. Marshall, Intention—In Law and Society 138 (1968), says:

"The defendant wished to take government property from a

> ing of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.*, at 263.

At the other extreme is *Lambert* v. *California*, 355 U. S. 225, in which a municipal code made it a crime to remain in Los Angeles for more than five days without registering if a person had been convicted of a felony. Being in Los Angeles is not *per se* blameworthy. The mere failure to register, we held, was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.*, at 228. The fact that the ordinance was a convenient law enforcement technique did not save it.

> "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.*, at 229–230.

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government bombing range, he had the capacity to take it, he had the opportunity, he tried and succeeded in taking it (his wish was fulfilled, his act accomplished). For recovery in a tort action no more would have to be shown to establish liability, but the court held that to make his action criminal 'a felonious intent,' *mens rea*, had to be established. This could not be presumed from his actions, which were open, without concealment, and in the belief—according to his statement—that the property had been abandoned. In other words, for the happening to be criminal, the wish had to be to accomplish something criminal. So in discussing intent we may have wishes of two different characters: one giving a basis for civil liability (the wish to take property not one's own), and another which would support criminal liability as well as civil (taking property with criminal intent)."

In *United States* v. *Dotterweich,* 320 U. S. 277, 284, a case dealing with the imposition of a penalty on a corporate officer whose firm shipped adulterated and misbranded drugs in violation of the Food and Drug Act, we approved the penalty "though consciousness of wrongdoing be totally wanting."

The present case is in the category neither of *Lambert* nor *Morissette,* but is closer to *Dotterweich.* This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act.[14] They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States* v. *Balint,* 258 U. S. 250, 254, where a defendant was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act. We say with Chief Justice Taft in that case:

> "It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute,

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[14] We need not decide whether a criminal conspiracy to do an act "innocent in itself" and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy. Cf. *United States* v. *Mack,* 112 F. 2d 290.

and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.*, at 253–254.

Reversed.

MR. JUSTICE BRENNAN, concurring in the judgment of reversal.

I agree that the amendments to the National Firearms Act, 26 U. S. C. §§ 5841–5872 (1964 ed., Supp. V), do not violate the Fifth Amendment's privilege against self-incrimination, and join Part I of the opinion of the Court. However, I do not join Part II of the opinion; although I reach the same result as the Court on the intent the Government must prove to convict, I do so by another route.

I join Part I on my understanding of the Act's new immunity provision. 26 U. S. C. § 5848 (1964 ed., Supp. V). The amended registration provisions of the National Firearms Act do not pose any realistic possibility of self-incrimination of the transferee under federal law. An effective registration of a covered firearm will render the transferee's possession of that firearm legal under federal law. It is only appellees' contention that registration or application for registration will incriminate them under California law that raises the Fifth Amendment issue in this case. Specifically, appellees assert that California law outlaws possession of hand grenades and that registration under federal law would, therefore, incriminate them under state law. Assuming that appellees correctly interpret California law, I think that the Act's immunity provision suffices to supplant the

constitutional protection. Section 5848 provides in pertinent part:

> "No information or evidence obtained from an application . . . shall . . . be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application . . . ."

In my judgment, this provision would prevent a State from making any use of a federal registration or application, or any fruits thereof, in connection with a prosecution under the State's possession law.[1] This would be true even if the State charged a transferee with possession of the firearm on a date after the date the application was filed, because possession is a continuing violation.[2] Therefore, for purposes of the State's possession law, a transferee's continued possession of a registered firearm would constitute "a violation of law occurring . . . concurrently with the filing of the application."

I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm. The only disclosure required under the amended Act is that the transferee has received a firearm and is in possession of it. Thus, in connection with the present general registration scheme, "[t]he relevant class of activities 'perme-

[1] No question of transactional immunity is raised here since the case involves incrimination under the laws of a jurisdiction different from the one compelling the incriminating information. *Piccirillo* v. *New York*, 400 U. S. 548, 552 (BRENNAN, J., dissenting).

[2] The result would be the same if a transferee moved from a State where possession was legal to a State where possession was illegal. The time when the possession became illegal cannot affect the continuing nature of the act of possession.

ated with criminal statutes,'" *Mackey* v. *United States*, *post*, at 710 (BRENNAN, J., concurring in judgment), is limited to the class of activities relating to possession of firearms. *Id.*, at 707–711. Since I read the statute's immunity provision to provide immunity co-extensive with the privilege in that regard, I find no Fifth Amendment bar to the enforcement of the federal statute.

The Court's discussion of the intent the Government must prove to convict appellees of violation of 26 U. S. C. § 5861 (d) (1964 ed., Supp. V) does not dispel the confusion surrounding a difficult, but vitally important, area of the law. This case does not raise questions of "consciousness of wrongdoing" or "blameworthiness." If the ancient maxim that "ignorance of the law is no excuse" has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy. Nor is it possible to decide this case by a simple process of classifying the statute involved as a "regulatory" or a "public welfare" measure. To convict appellees of possession of unregistered hand grenades, the Government must prove three material elements: (1) that appellees possessed certain items; (2) that the items possessed were hand grenades; and (3) that the hand grenades were not registered. The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all need be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements. It is no help in deciding what level of intent must be proved as

to the third element to declare that the offense falls within the "regulatory" category.

Following the analysis of the Model Penal Code,[3] I think we must recognize, first, that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U. S. 494, 500 (1951) (Vinson, C. J., announcing judgment); *Smith* v. *California*, 361 U. S. 147, 150 (1959);[4] second, that *mens rea* is not a unitary concept, but may vary as to each element of a crime; and third, that Anglo-American law has developed several identifiable and analytically distinct levels of intent, *e. g.*, negligence, recklessness, knowledge, and purpose.[5] To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what

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[3] ALI Model Penal Code § 2.02, Comment 123–132 (Tent. Draft No. 4, 1955).

[4] "Still, it is doubtless competent for the [government] to create strict criminal liabilities by defining criminal offenses without any element of scienter—though . . . there is precedent in this Court that this power is not without limitations. See *Lambert* v. *California*, 355 U. S. 225." *Smith* v. *California*, 361 U. S. 147, 150 (1959). The situations in which strict liability may be imposed were stated by Judge, now MR. JUSTICE, BLACKMUN: "[W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent." *Holdridge* v. *United States*, 282 F. 2d 302, 310 (CA8 1960).

[5] These different levels of intent are defined in the code. ALI Model Penal Code § 2.02 (Prop. Official Draft 1962). This Court has relied on the code's definitions. *Leary* v. *United States*, 395 U. S. 6, 46 n. 93 (1969); *Turner* v. *United States*, 396 U. S. 398, 416 n. 29 (1970).

level of intent Congress intended the Government to prove, taking into account constitutional considerations, see *Screws* v. *United States*, 325 U. S. 91 (1945), as well as the common-law background, if any, of the crime involved. See *Morissette* v. *United States*, 342 U. S. 246 (1952).

Although the legislative history of the amendments to the National Firearms Act is silent on the level of intent to be proved in connection with each element of the offense, we are not without some guideposts. I begin with the proposition stated in *Morissette* v. *United States*, 342 U. S., at 250, that the requirement of *mens rea* "is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." In regard to the first two elements of the offense, (1) possession of items that (2) are hand grenades, the general rule in favor of some intent requirement finds confirmation in the case law under the provisions replaced by the present amendments. The cases held that a conviction of an individual of illegal possession of unregistered firearms had to be supported by proof that his possession was "willing and conscious" and that he knew the items possessed were firearms. *E. g., Sipes* v. *United States*, 321 F. 2d 174, 179 (CA8 1963); *United States* v. *Decker*, 292 F. 2d 89 (CA6 1961). Congress did not disapprove these cases, and we may therefore properly infer that Congress meant that the Government must prove knowledge with regard to the first two elements of the offense under the amended statute.

The third element—the unregistered status of the grenades—presents more difficulty. Proof of intent with regard to this element would require the Government to show that the appellees knew that the grenades were

unregistered or negligently or recklessly failed to ascertain whether the weapons were registered. It is true that such a requirement would involve knowledge of law, but it does *not* involve "consciousness of wrongdoing" in the sense of knowledge that one's actions were prohibited or illegal.[6] Rather, the definition of the crime, as written by Congress, requires proof of circumstances that involve a legal element, namely whether the grenades were registered in accordance with federal law. The knowledge involved is solely knowledge of the circumstances that the law has defined as material to the offense. The Model Penal Code illustrates the distinction:

> "It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact. . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that

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[6] Proof of some crimes may include a requirement of proof of actual knowledge that the act was prohibited by law, or proof of a purpose to bring about the forbidden result. See *James* v. *United States*, 366 U. S. 213 (1961); *Boyce Motor Lines* v. *United States*, 342 U. S. 337 (1952). *United States* v. *Murdock*, 290 U. S. 389 (1933). See generally Note, Counseling Draft Resistance: The Case for a Good Faith Belief Defense, 78 Yale L. J. 1008, 1022–1037 (1969). Cf. Model Penal Code § 2.02 (2)(a) (Prop. Official Draft 1962) (definition of "purposely").

are material to the offense." Model Penal Code § 2.02, Comment 131 (Tent. Draft No. 4, 1955).

Therefore, as with the first two elements, the question is solely one of congressional intent. And while the question is not an easy one, two factors persuade me that proof of *mens rea* as to the unregistered status of the grenades is not required. First, as the Court notes, the case law under the provisions replaced by the current law dispensed with proof of intent in connection with this element. *Sipes* v. *United States, supra.* Second, the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, antitank guns, and bazookas. Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. In the context of a taxing and registration scheme, I therefore think it reasonable to conclude that Congress dispensed with the requirement of intent in regard to the unregistered status of the weapon, as necessary to effective administration of the statute.

Syllabus

INVESTMENT COMPANY INSTITUTE ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 61. Argued December 15, 1970—Decided April 5, 1971*

Petitioners in No. 61, an association of open-end investment companies and several individual such companies, attack (1) portions of the Comptroller of the Currency's Regulation 9, purporting to authorize banks to operate collective investment funds, as violative of the Glass-Steagall Banking Act of 1933 and (2) the Comptroller's approval given First National City Bank to operate a collective investment fund. Petitioner in No. 59 seeks review of a Securities and Exchange Commission (SEC) order exempting that fund from certain provisions of the Investment Company Act of 1940. The District Court concluded in No. 61 that the challenged provisions of Regulation 9 were invalid. The Court of Appeals, after consolidating the cases, held that the Comptroller's and the SEC's actions were consonant with the relevant statutes, and affirmed the SEC's order and reversed the District Court. *Held:*

1. Petitioners in No. 61 do not lack standing to challenge whether national banks may legally enter a field in competition with them. *Data Processing Service* v. *Camp*, 397 U. S. 150. Pp. 620–621.

2. The operation of a collective investment fund of the kind approved by the Comptroller, that is in direct competition with the mutual fund industry, involves a bank in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act. Pp. 621–639.

136 U. S. App. D. C. 241, 420 F. 2d 83, reversed in No. 61, and vacated in No. 59.

STEWART, J., delivered the opinion of the Court, in which BLACK, DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. HARLAN,

*Together with No. 59, *National Association of Securities Dealers, Inc.* v. *Securities and Exchange Commission et al.*, argued December 14–15, 1970, also on certiorari to the same court.

J., *post*, p. 639, and BLACKMUN, J., *post*, p. 642, filed dissenting opinions. BURGER, C. J., took no part in the consideration or decision of these cases.

G. Duane Vieth argued the cause for petitioners in No. 61. With him on the briefs were *James F. Fitzpatrick, Melvin Spaeth,* and *Robert Augenblick. Joseph B. Levin* argued the cause for petitioner in No. 59. With him on the briefs was *Lloyd J. Derrickson.*

Deputy Solicitor General Friedman argued the cause for respondent Camp, Comptroller of the Currency, in No. 61. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Richard B. Stone, Alan S. Rosenthal, Leonard Schaitman,* and *C. Westbrook Murphy. Mr. Friedman,* by special leave of Court, argued the cause for the United States as *amicus curiae* urging affirmance in No. 59. With him on the brief were *Solicitor General Griswold* and *Mr. Stone. Archibald Cox* argued the cause for respondent First National City Bank in both cases. With him on the brief was *Stephen Ailes.*

Robert L. Stern filed a brief for Corporate Fiduciaries Association of Chicago as *amicus curiae* urging affirmance in both cases.

MR. JUSTICE STEWART delivered the opinion of the Court.

These companion cases involve a double-barreled assault upon the efforts of a national bank to go into the business of operating a mutual investment fund. The petitioners in No. 61 are an association of open-end investment companies and several individual such companies. They brought an action in the United States District Court for the District of Columbia, attacking portions of Regulation 9 issued by the Comptroller of the

Currency,[1] on the ground that this Regulation, in purporting to authorize banks to establish and operate collective investment funds, sought to permit activities prohibited to national banks or their affiliates by various provisions of the Glass-Steagall Banking Act of 1933, 48 Stat. 162.[2] The petitioners also specifically attacked the Comptroller's approval of the application of First National City Bank of New York for permission to establish and operate a collective investment fund. In No. 59 the National Association of Securities Dealers filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of an order of the Securities and Exchange Commission that partially exempted the collective investment fund of First National City Bank of New York from various provisions of the Investment Company Act of 1940.[3]

In No. 61 the District Court concluded that the challenged provisions of Regulation 9 were invalid under the Glass-Steagall Act.[4] The Comptroller and First National City Bank appealed from this decision, and the appeal was consolidated with the petition for review in No. 59. The Court of Appeals held that the actions taken by the Securities and Exchange Commission and the Comptroller were fully consonant with the statutes committed to their regulatory supervision. Accordingly, it affirmed the order of the Commission and reversed the judgment of the District Court.[5] We granted certiorari to consider important questions presented under federal regu-

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[1] 12 CFR Pt. 9 (1970).

[2] The provisions of the Glass-Steagall Act are codified in various sections scattered through Title 12 of the United States Code.

[3] The exemption was granted in response to an application filed pursuant to § 6 (c) of the Act, 54 Stat. 802, 15 U. S. C. § 80a–6 (c).

[4] 274 F. Supp. 624.

[5] 136 U. S. App. D. C. 241, 420 F. 2d 83.

latory statutes.[6] For the reasons that follow, we hold Regulation 9 invalid insofar as it authorizes the sale of interests in an investment fund of the type established by First National City Bank pursuant to the Comptroller's approval. This disposition makes it unnecessary to consider the propriety of the action of the Securities and Exchange Commission in affording this fund exemption from certain of the provisions of the Investment Company Act of 1940.

I

In No. 61 it is urged at the outset that petitioners lack standing to question whether national banks may legally enter a field in competition with them. This contention is foreclosed by *Data Processing Service* v. *Camp*, 397 U. S. 150. There we held that companies that offered data processing services to the general business community had standing to seek judicial review of a ruling by the Comptroller that national banks could make data processing services available to other banks and to bank customers. We held that data processing companies were sufficiently injured by the competition that the Comptroller had authorized to create a case or controversy. The injury to the petitioners in the instant case is indistinguishable. We also concluded that Congress did not intend "to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under [the National Bank Act]." 397 U. S., at 157. This is precisely the review that the petitioners have sought in this case. Finally, we concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. We noted that whether Congress had indeed prohibited such competition was a question for the merits. In the

[6] 397 U. S. 986.

discussion that follows in the balance of this opinion we deal with the merits of the petitioners' contentions and conclude that Congress did legislate against the competition that the petitioners challenge. There can be no real question, therefore, of the petitioners' standing in the light of the *Data Processing* case. See also *Arnold Tours* v. *Camp,* 400 U. S. 45.

II

The issue before us is whether the Comptroller of the Currency may, consistently with the banking laws, authorize a national bank to offer its customers the opportunity to invest in a stock fund created and maintained by the bank. Before 1963 national banks were prohibited by administrative regulation from offering this service. The Board of Governors of the Federal Reserve System, which until 1962 had regulatory jurisdiction over all the trust activities of national banks, allowed the collective investment of trust assets only for "the investment of funds held for true fiduciary purposes." The applicable regulation, Regulation F, specified that "the operation of such Common Trust Funds as investment trusts for other than strictly fiduciary purposes is hereby prohibited." The Board consistently ruled that it was improper for a bank to use "a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Reserve Bull. 393 (1940); see also 42 Fed. Reserve Bull. 228 (1956); 41 Fed. Reserve Bull. 142 (1955).

In 1962 Congress transferred jurisdiction over most of the trust activities of national banks from the Board of Governors of the Federal Reserve System to the Comptroller of the Currency, without modifying any provision

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of substantive law. Pub. L. 87–722, 76 Stat. 668, 12 U. S. C. § 92a. The Comptroller thereupon solicited suggestions for improving the regulations applicable to trust activities. Subsequently, new regulations were proposed which expressly authorized the collective investment of monies delivered to the bank for investment management, so-called managing agency accounts. These proposed regulations were officially promulgated in 1963 with changes not material here.[7] In 1965 the First National City Bank of New York submitted for the Comptroller's approval a plan for the collective investment of managing agency accounts. The Comptroller promptly approved the plan, and it is now in operation. This plan, which departs in some respects from the plan envisaged by the Comptroller's Regulation, is expected, the briefs tell us, to be a model for other banks which decide to offer their customers a collective investment service.[8]

Under the plan the bank customer tenders between $10,000 and $500,000 to the bank, together with an authorization making the bank the customer's managing agent. The customer's investment is added to the fund, and a written evidence of participation is issued which expresses in "units of participation" the customer's proportionate interest in fund assets. Units of participation are freely redeemable, and transferable to anyone who has executed a managing agency agreement with the bank. The fund is registered as an investment company under the Investment Company Act of 1940. The bank is

[7] 12 CFR § 9.18 (a) provides that: "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively: . . . (3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust . . . ."

[8] For example, the investment fund plan as established does not provide that the bank receives the investor's money in trust.

the underwriter of the fund's units of participation within the meaning of that Act. The fund has filed a registration statement pursuant to the Securities Act of 1933. The fund is supervised by a five-member committee elected annually by the participants pursuant to the Investment Company Act of 1940. The Securities and Exchange Commission has exempted the fund from the Investment Company Act to the extent that a majority of this committee may be affiliated with the bank, and it is expected that a majority always will be officers in the bank's trust and investment division.[9] The actual custody and investment of fund assets is carried out by the bank as investment advisor pursuant to a management agreement. Although the Investment Company Act requires that this management agreement be approved annually by the committee, including a majority of the unaffiliated members, or by the participants, it is expected that the bank will continue to be investment advisor.

III

Section 16 of the Glass-Steagall Act as amended, 12 U. S. C. § 24, Seventh, provides that the "business of dealing in securities and stock [by a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account . . . . Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of any shares of stock of any corporation." [10] The peti-

[9] The opinion of the Commission and the dissent of Commissioner Budge are unofficially reported at CCH Fed. Sec. L. Rep., 1964–1966 Decisions, ¶ 77,332.

[10] Section 16, as enacted in 1933, granted no authority to purchase stock for the account of customers and prohibited any purchase of stock by a national bank. The 1935 Amendments to the

tioners contend that a purchase of stock by a bank's investment fund is a purchase of stock by a bank for its own account in violation of this section.

Section 16 also provides that a national bank "shall not underwrite any issue of securities or stock." And § 21 of the same Act, 12 U. S. C. § 378 (a), provides that "it shall be unlawful—(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of [deposit banking]." The petitioners contend that the creation and operation of an investment fund by a bank which offers to its customers the opportunity to purchase an interest in the fund's assets constitutes the issuing, underwriting, selling, or distributing of securities or stocks in violation of these sections.

The questions raised by the petitioners are novel and substantial. National banks were granted trust powers in 1913. Federal Reserve Act, § 11, 38 Stat. 261. The first common trust fund was organized in 1927, and such funds were expressly authorized by the Federal Reserve Board by Regulation F promulgated in 1937. Report on Commingled or Common Trust Funds Administered by Banks and Trust Companies, H. R. Doc. No. 476, 76th Cong., 2d Sess., 4–5 (1939). For at least a generation, therefore, there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds on the one hand, and act as a managing agent on the other. No provision of the bank-

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National Bank Act included a provision intended to make it clear that a national bank may buy stock for the account of customers but not for its own account. S. Rep. No. 1007, 74th Cong., 1st Sess., 17; H. R. Rep. No. 742, 74th Cong., 1st Sess., 18.

ing law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character. The differences between the investment fund that the Comptroller has authorized and a conventional open-end mutual fund are subtle at best, and it is undisputed that this bank investment fund finds itself in direct competition with the mutual fund industry. One would suppose that the business of a mutual fund consists of buying stock "for its own account" and of "issuing" and "selling" "stock" or "other securities" evidencing an undivided and redeemable interest in the assets of the fund.[11] On their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks.[12]

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[11] A mutual fund is an open-end investment company. The Investment Company Act of 1940 defines an investment company as an "issuer" of "any security" which "is or holds itself out as being engaged primarily . . . in the business of investing . . . in securities . . . ." 15 U. S. C. §§ 80a–2 (a)(21), 80a–3 (a)(1). An open-end company is one "which is offering for sale or has outstanding any redeemable security of which it is the issuer." 15 U. S. C. § 80a–5 (a)(1). An investment company also includes a "unit investment trust": an investment company which, among other things, "is organized under a . . . contract of . . . agency . . . and . . . issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities . . . ." 15 U. S. C. § 80a–4 (2).

[12] Section 20 of the Act, 12 U. S. C. § 377, prohibits affiliations between banks that are members of the Federal Reserve System and organizations "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities . . . ." And § 32, 12 U. S. C. § 78, provides that no officer, director, or employee of a bank in the Federal Reserve System may serve at the same time as officer, director, or employee of an association primarily engaged in the activity de-

But we cannot come lightly to the conclusion that the Comptroller has authorized activity that violates the banking laws. It is settled that courts should give great weight to any reasonable construction of a regulatory

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scribed in § 20. The petitioners contend that if a bank's investment fund be conceived as an entity distinct from the bank, then its affiliation with the investment fund is in violation of these sections.

The Board of Governors has had occasion to consider whether an investment fund of the type operated by First National City Bank involves a violation of § 32 of the Glass-Steagall Act. 12 CFR § 218.111 (1970). The Board concluded, based on "general principles that have been developed in respect to the application of section 32," that it would not violate that section for officers of the bank's trust department to serve at the same time as officers of the investment fund because the fund and the bank "constitute a single entity," and the fund "would be regarded as nothing more than an arm or department of the bank." The Board called attention to § 21 whose provisions it summarized as forbidding "a securities firm or organization to engage in the business of receiving deposits, subject to certain exceptions." The Board, however, declined to express a position concerning the applicability of this section because of its policy not to express views as to the meaning of statutes that carry criminal penalties. Nor has the Board expressed its views on the application of any other provision of the banking law to the creation and operation of a bank investment fund.

We have no doubt but that the Board's construction and application of § 32 is both reasonable and rational. The investment fund service authorized by the Comptroller's regulation and as provided by the First National City Bank is a service available only to customers of the bank. It is held out as a service provided by the bank, and the investment fund bears the bank's name. The bank has effective control over the activities of the investment fund. Moreover, there is no danger that to characterize the bank and its fund as a single entity will disserve the purpose of Congress. The limitations that the banking laws place on the activities of national banks are at least as great as the limitations placed on the activities of their affiliates. For example, § 32 refers to the "public sale" of stocks or securities while § 21 proscribes the "selling" of stocks or securities.

statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank* v. *Missouri*, 263 U. S. 640, 658.

The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as to the meaning and impact of the provisions of §§ 16 and 21 as they affect bank investment funds. The Comptroller promulgated Regulation 9 without opinion or accompanying statement. His subsequent report to Congress did not advert to the prohibitions of the Glass-Steagall Act. Comptroller of the Currency, 101st Annual Report 14–15 (1963).[13] To be sure, counsel for the

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[13] A law review article written by Comptroller Saxon and Deputy Comptroller Miller in 1965 did take the position that the Glass-Steagall Act is inapplicable to bank common trust funds. Saxon & Miller, Common Trust Funds, 53 Geo. L. J. 994 (1965). But this view was predicated on the argument that when Congress in 1936 provided a tax exemption for common trust funds maintained by a bank, now 26 U. S. C. § 584, it contemplated the exemption of common trust funds created for strictly investment purposes, and that consequently Congress must have assumed that the banking laws, which otherwise appear to proscribe such funds, were not applicable. *Id.*, at 1008–1010. Whatever the merits of this argument, it has no bearing on the instant litigation. It is clear that the collective investment funds authorized by Regulation 9 need not qualify for tax exemption under § 584; the First National City Bank Fund does not so qualify. Moreover, the position advanced in the brief filed on behalf of the Comptroller in this litigation is not that the banking laws are inapplicable to bank investment funds, but rather that the creation and operation of such funds are consistent with the banking laws.

It is noteworthy that the § 584 exemption is available to common trust funds "maintained by a bank . . . exclusively for the collective

Comptroller in the course of this litigation, and specifically in his briefs and oral argument in this Court, has rationalized the basis of Regulation 9 with great professional competence. But this is hardly tantamount to an administrative interpretation of §§ 16 and 21. In *Burlington Truck Lines* v. *United States*, 371 U. S. 156, we said, "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review." *Id.*, at 168–169. Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress. Quite obviously the Comptroller should not grant new authority to national banks until he is satisfied that the exercise of this authority will not violate the intent of the banking laws. If he faces such questions only after he has acted, there is substantial danger that the momentum generated by initial approval may seriously impair the enforcement of the banking laws that Congress enacted.

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investment and reinvestment of moneys contributed thereto by the bank in its capacity as a *trustee, executor, administrator, or guardian* . . . ." (Emphasis added.) This language, which makes no reference to contributions by the bank in its capacity as managing agent, is identical to that exempting such common trust funds from the Investment Company Act of 1940, 15 U. S. C. § 80a–3 (c)(3). The Securities and Exchange Commission has taken the position that commingled managing agency accounts do not come within § 80a–3 (c)(3). See Statement of Commissioner Cary, Hearings on Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, before a Subcommittee of the House Committee on Government Operations, 88th Cong., 1st Sess., 3 (1963).

IV

There is no dispute that one of the objectives of the Glass-Steagall Act was to prohibit commercial banks, banks that receive deposits subject to repayment, lend money, discount and negotiate promissory notes and the like, from going into the investment banking business. Many commercial banks were indirectly engaged in the investment banking business when the Act was passed in 1933. Even before the passage of the Act it was generally believed that it was improper for a commercial bank to engage in investment banking directly.[14] But in 1908 banks began the practice of establishing security affiliates that engaged in, *inter alia*, the business of floating bond issues and, less frequently, underwriting stock issues.[15] The Glass-Steagall Act confirmed that national banks could not engage in investment banking directly, and in addition made affiliation with an organization so engaged illegal. One effect of the Act was to abolish the security affiliates of commercial banks.[16]

It is apparent from the legislative history of the Act why Congress felt that this drastic step was necessary. The failure of the Bank of United States in 1930 was widely attributed to that bank's activities with respect to its numerous securities affiliates.[17] Moreover, Con-

[14] Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency (hereafter 1931 Hearings), 71st Cong., 3d Sess., 40 (1931); 1920 Report of the Comptroller of the Currency, quoted *id.*, at 1067, 1068. Senator Glass, commenting on earlier banking legislation, said, "We tried to, and thought at the time we had, removed the system as far as possible from the influence of the stock market." *Id.*, at 262.

[15] *Id.*, at 1052.

[16] Report on Investment Trusts and Investment Companies, pt. 2, H. R. Doc. No. 70, 76th Cong., 1st Sess., 59 (1939).

[17] 1931 Hearings 116–117, 1017, 1068.

gress was concerned that commercial banks in general and member banks of the Federal Reserve System in particular had both aggravated and been damaged by stock market decline partly because of their direct and indirect involvement in the trading and ownership of speculative securities.[18] The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the "hazards" and "financial dangers" that arise when commercial banks engage in the activities proscribed by the Act.[19]

The hazards that Congress had in mind were not limited to the obvious danger that a bank might invest its own assets in frozen or otherwise imprudent stock or security investments. For often securities affiliates had operated without direct access to the assets of the bank. This was because securities affiliates had frequently been established with capital paid in by the bank's stockholders, or by the public, or through the allocation of a legal dividend on bank stock for this purpose.[20] The legislative history of the Glass-Steagall Act shows that Congress also had in mind and repeatedly focused on the more subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary or managing agent and enters the investment banking business either directly or by establishing an affiliate to hold and sell particular investments. This course places new promotional and other pressures on the bank which in turn create new

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[18] See S. Rep. No. 77, 73d Cong., 1st Sess., 6, 8, 10.

[19] *Id.*, at 18; see 1931 Hearings 365; 75 Cong. Rec. 9911 (remarks of Sen. Bulkley).

[20] 1931 Hearings 41, 192, 1056; 1920 Report of the Comptroller of the Currency, quoted *id.*, at 1067.

temptations. For example, pressures are created because the bank and the affiliate are closely associated in the public mind, and should the affiliate fare badly, public confidence in the bank might be impaired. And since public confidence is essential to the solvency of a bank, there might exist a natural temptation to shore up the affiliate through unsound loans or other aid.[21] Moreover, the pressure to sell a particular investment and to make the affiliate successful might create a risk that the bank would make its credit facilities more freely available to those companies in whose stock or securities the affiliate has invested or become otherwise involved. Congress feared that banks might even go so far as to make unsound loans to such companies.[22] In any event, it was thought that the bank's salesman's interest might impair its ability to function as an impartial source of credit.[23]

Congress was also concerned that bank depositors might suffer losses on investments that they purchased in reliance on the relationship between the bank and its affiliate.[24] This loss of customer good will might "become an important handicap to a bank during a major period of security market deflation." [25] More broadly,

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[21] 1931 Hearings 20, 237, 1063. See also *id.*, at 1058, where it is said:

"Activities of a bank's security affiliate as a holding or finance company or an investment trust are also fraught with the danger of large losses during a deflation period. Bank affiliates of this kind show a much greater tendency to operate with borrowed funds than do organizations of this type which are independent of banks, the reason being that the identity of control and management which prevails between the bank and its affiliate tends to encourage reliance upon the lending facilities of the former."

[22] See *id.*, at 1064; 75 Cong. Rec. 9912 (remarks of Sen. Bulkley).

[23] See 1931 Hearings 87 (remarks of Chairman Glass).

[24] See 77 Cong. Rec. 4028 (remarks of Rep. Fish).

[25] 1931 Hearings 1064.

Congress feared that the promotional needs of investment banking might lead commercial banks to lend their reputation for prudence and restraint to the enterprise of selling particular stocks and securities, and that this could not be done without that reputation being undercut by the risks necessarily incident to the investment banking business.[26] There was also perceived the danger that when commercial banks were subject to the promotional demands of investment banking, they might be tempted to make loans to customers with the expectation that the loan would facilitate the purchase of stocks and securities.[27] There was evidence before Congress that loans for investment written by commercial banks had done much to feed the speculative fever of the late 1920's.[28] Senator Glass made it plain that it was "the fixed purpose of Congress" not to see the facilities of commercial banking diverted into speculative operations by the aggressive and promotional character of the investment banking business.[29]

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[26] See 75 Cong. Rec. 9912:

"And although such a loss would possibly not result in any substantial impairment of the resources of the banking institution owning that affiliate . . . there can be no doubt that the whole transaction tends to discredit the bank and impair the confidence of its depositors." (Remarks of Sen. Bulkley.)

[27] S. Rep. No. 77, 73d Cong., 1st Sess., 9–10.

[28] 1931 Hearings 1006–1029; S. Rep. No. 77, 73d Cong., 1st Sess., 8–9.

[29] 75 Cong. Rec. 9884. See also S. Rep. No. 77, 73d Cong., 1st Sess., 8:

"The outstanding development in the commercial banking system during the prepanic period was the appearance of excessive security loans, and of overinvestment in securities of all kinds. The effects of this situation in changing the whole character of the banking problem can hardly be overemphasized. National banks were never intended to undertake investment banking business on a large scale, and the whole tenor of legislation and administrative rulings concern-

Another potential hazard that very much concerned Congress arose from the plain conflict between the promotional interest of the investment banker and the obligation of the commercial banker to render disinterested investment advice. Senator Bulkley stated:

> "Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits." [30]

Congress had before it evidence that security affiliates might be driven to unload excessive holdings through the trust department of the sponsor bank.[31] Some witnesses at the hearings expressed the view that this practice constituted self-dealing in violation of the trustee's obligation of loyalty, and indeed that it would be improper for a bank's trust department to purchase anything from the bank's securities affiliate.[32]

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ing them has been away from recognition of such a growth in the direction of investment banking as legitimate."

In the same vein Representative Steagall said:

"Our great banking system was diverted from its original purposes into investment activities . . . .

. . . . . .

"The purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the framers of the Federal Reserve Act." 77 Cong. Rec. 3835.

[30] 75 Cong. Rec. 9912.

[31] 1931 Hearings 237; cf. *id.*, at 1064.

[32] *Id.*, at 266, 300, 311.

In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system. As Senator Bulkley put it:

> "If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business." [33]

V

The language that Congress chose to achieve this purpose includes the prohibitions of § 16 that a national bank "shall not underwrite any issue of securities or stock" and shall not purchase "for its own account . . . any shares of stock of any corporation," and the prohibition of § 21 against engaging in "the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities." In this litigation the Comptroller takes the position that the operation of a bank investment fund is consistent with these provisions, because participating interests in such a fund are not "securities" within the meaning of the Act. It is argued that a bank investment fund simply makes available to the small investor the benefit of investment management by a bank trust department which would otherwise be available only to large investors, and that the operation of an investment fund creates no problems that are not present whenever a bank invests in securities for the account of customers.

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[33] 75 Cong. Rec. 9912.

But there is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word "securities." To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt. And certainly there is nothing in the language of these provisions to suggest that the sale of an interest in the business of buying, holding, and selling stocks for investment is to be distinguished from the sale of an interest in a commercial or industrial enterprise.

Indeed, there is direct evidence that Congress specifically contemplated that the word "security" includes an interest in an investment fund. The Glass-Steagall Act was the product of hearings conducted pursuant to Senate Resolution 71 which included among the topics to be investigated the impact on the banking system of the formation of investment and security trusts.[34] The subcommittee found that one of the activities in which bank security affiliates engaged was that of an investment trust: "buying and selling securities acquired purely for investment or speculative purposes." [35] Since Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust.[36]

But, in any event, we are persuaded that the purposes for which Congress enacted the Glass-Steagall Act leave no room for the conclusion that a participation in a bank investment fund is not a "security" within the

[34] S. Res. 71, 71st Cong., 2d Sess., is reprinted in S. Rep. No. 77, 73d Cong., 1st Sess., 1.

[35] 1931 Hearings 1057. See also *id.*, at 307.

[36] See also *supra*, n. 21.

meaning of the Act. From the perspective of competition, convenience, and expertise, there are arguments to be made in support of allowing commercial banks to enter the investment banking business. But Congress determined that the hazards outlined above made it necessary to prohibit this activity to commercial banks. Those same hazards are clearly present when a bank undertakes to operate an investment fund.

A bank that operates an investment fund has a particular investment to sell. It is not a matter of indifference to the bank whether the customer buys an interest in the fund or makes some other investment. If its customers cannot be persuaded to invest in the bank's investment fund, the bank will lose their investment business and the fee which that business would have brought in. Even as to accounts large enough to qualify for individual investment management, there might be a potential for a greater profit if the investment were placed in the fund rather than in individually selected securities, because of fixed costs and economies of scale. The mechanics of operating an investment fund might also create promotional pressure. When interests in the fund were redeemed, the bank would be effectively faced with the choice of selling stocks from the fund's portfolio or of selling new participations to cover redemptions. The bank might have a pecuniary incentive to choose the latter course in order to avoid the cost of stock transactions undertaken solely for redemption purposes.

Promotional incentives might also be created by the circumstance that the bank's fund would be in direct competition with mutual funds that, from the point of view of the investor, offered an investment opportunity comparable to that offered by the bank. The bank would want to be in a position to show to the prospective customer that its fund was more attractive than the mutual funds offered by others. The bank would have

a salesman's stake in the performance of the fund, for if the fund were less successful than the competition the bank would lose business and the resulting fees.

A bank that operated an investment fund would necessarily put its reputation and facilities squarely behind that fund and the investment opportunity that the fund offered. The investments of the fund might be conservative or speculative, but in any event the success or failure of the fund would be a matter of public record. Imprudent or unsuccessful management of the bank's investment fund could bring about a perhaps unjustified loss of public confidence in the bank itself. If imprudent management should place the fund in distress, a bank might find itself under pressure to rescue the fund through measures inconsistent with sound banking.

The promotional and other pressures incidental to the operation of an investment fund, in other words, involve the same kinds of potential abuses that Congress intended to guard against when it legislated against bank security affiliates. It is not the slightest reflection on the integrity of the mutual fund industry to say that the traditions of that industry are not necessarily the conservative traditions of commercial banking. The needs and interests of a mutual fund enterprise more nearly approximate those of securities underwriting, the activity in which bank security affiliates were primarily engaged. When a bank puts itself in competition with mutual funds, the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking.

And there are other potential hazards of the kind Congress sought to eliminate with the passage of the Glass-Steagall Act. The bank's stake in the investment fund might distort its credit decisions or lead to unsound loans to the companies in which the fund had invested. The bank might exploit its confidential

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relationship with its commercial and industrial creditors for the benefit of the fund. The bank might undertake, directly or indirectly, to make its credit facilities available to the fund or to render other aid to the fund inconsistent with the best interests of the bank's depositors. The bank might make loans to facilitate the purchase of interests in the fund. The bank might divert talent and resources from its commercial banking operation to the promotion of the fund. Moreover, because the bank would have a stake in a customer's making a particular investment decision—the decision to invest in the bank's investment fund—the customer might doubt the motivation behind the bank's recommendation that he make such an investment. If the fund investment should turn out badly there would be a danger that the bank would lose the good will of those customers who had invested in the fund. It might be unlikely that disenchantment would go so far as to threaten the solvency of the bank. But because banks are dependent on the confidence of their customers, the risk would not be unreal.

These are all hazards that are not present when a bank undertakes to purchase stock for the account of its individual customers or to commingle assets which it has received for a true fiduciary purpose rather than for investment. These activities, unlike the operation of an investment fund, do not give rise to a promotional or salesman's stake in a particular investment; they do not involve an enterprise in direct competition with aggressively promoted funds offered by other investment companies; they do not entail a threat to public confidence in the bank itself; and they do not impair the bank's ability to give disinterested service as a fiduciary or managing agent. In short, there is a plain difference between the sale of fiduciary services and the sale of investments.[37]

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[37] See 26 Fed. Reserve Bull. 393 (1940), quoted *supra*, at 621.

VI

The Glass-Steagall Act was a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse. The literal terms of that Act clearly prevent what the Comptroller has sought to authorize here. Because the potential hazards and abuses that flow from a bank's entry into the mutual investment business are the same basic hazards and abuses that Congress intended to eliminate almost 40 years ago, we cannot but apply the terms of the federal statute as they were written. We conclude that the operation of an investment fund of the kind approved by the Comptroller involves a bank in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act. Accordingly, we reverse the judgment in No. 61 and vacate the judgment in No. 59.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, dissenting.

The Court holds that the Investment Company Institute has standing as a competitor to challenge the action of the Comptroller of the Currency because Congress "arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." The ICI, says the Court, is entitled to prevail because "Congress *did* legislate against the competition that the petitioners challenge." *Ante*, at 620, 621 (emphasis added.) I understand the Court to mean by "legislated against the competition" not only that Congress prohibited banks from entering this field of endeavor, but that it did so in part for reasons stemming from the fact

of the resulting competition. See *ante*, at 631–634, 636–638. However, the Court cannot mean by this phrase that it was Congress' purpose to protect petitioners' class against competitive injury for, as all three judges on the court below agreed, neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for the interests of petitioners and others like them in freedom from competition.[1] Indeed, it appears reasonably plain that, if anything, the Act was adopted despite its anticompetitive effects rather than because of them. Cf. *ante*, at 630, 636.

This being the case, the discussion of standing in *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 5–6 (1968), is directly in point:

> "This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U. S. 166 (1882); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U. S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*,

[1] "It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury." 136 U. S. App. D. C. 241, 263, 420 F. 2d 83, 105 (Burger, J., joined by Miller, J.) (footnote omitted); see also *id.*, at 254, 256–258, 420 F. 2d, at 96, 98–100 (Bazelon, C. J.).

> 264 U. S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."

I do not believe that *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970), and *Arnold Tours* v. *Camp*, 400 U. S. 45 (1970), require the opposite result from the one suggested by this passage from *Hardin*. *Data Processing* held that, aside from "case-or-controversy" problems not present here, the crucial question in ruling on a challenge to standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U. S., at 153. That question was resolved in favor of the data processors because "§ 4 [of the Bank Service Corporation Act] arguably brings a competitor within the zone of interests protected by it." *Id.*, at 156.[2] In *Arnold Tours* the Court observed that it was again dealing with § 4 of the Bank Service Corporation Act, and that "[n]othing in the [*Data Processing*] opinion limited § 4 to protecting only competitors in the data-processing field." 400 U. S., at 46. Plainly these cases provide little support for the Court's conclusion here that competitors, *as such*, have standing under the Glass-Steagall Act as well.

The Court's holding—that if Congress prohibited entry into a field of business for reasons relating to competition, then a competitor has standing to seek observance of the prohibition—has a surface appeal, but, so far as I can see, no sound analytical basis. Certainly none is offered. In any event, it appears to me that our prior decisions, particularly *Hardin*, require the conclusion that

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[2] See also *Barlow* v. *Collins*, 397 U. S. 159, 164 (1970).

the petitioners in No. 61 lack standing to challenge the Comptroller's action. While I would not foreclose the possibility that those cases should be further modified in some respect,[3] the Court has not undertaken to reexamine them, and I deem it inappropriate for me to do so as a single Justice.

The view that I take with regard to petitioners' standing in No. 61 makes it unnecessary for me to reach the merits in that case, but it does require me to rule on the contentions made in No. 59. Like MR. JUSTICE BLACKMUN, see *post*, at 645, I find lengthy discussion of this topic superfluous. At issue is the propriety of the action of the Securities and Exchange Commission in increasing from two to three the number of seats open to bank officers on the five-man committee which serves as a board of directors of the account.[4] Substantially for the reasons given by the judges of the court below, 136 U. S. App. D. C. 241, 249–253, 266, 420 F. 2d 83, 91–95, 108, I am of the opinion that the Commission did not abuse its discretion in determining that the facts of this case made appropriate an exercise of the dispensing power explicitly vested in the Commission by 15 U. S. C. § 80a–6 (c).

For the reasons given herein, I would affirm the two judgments under review.

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion and judgments here, it seems to me, are based more on what is deemed to be appropriate and desirable national banking *policy* than on what is a necessary judicial construction of the Glass-Steagall Act

[3] For one suggestion to this effect, see Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971).

[4] By virtue of the "person or party aggrieved" provision of the Investment Company Act, 15 U. S. C. § 80a–42 (a), there is no difficulty supporting petitioner's standing in No. 59.

of almost four decades ago. It is a far different thing to be persuaded that it is wise policy to keep national banks out of the business of operating mutual investment funds, despite the safeguards that the Comptroller of the Currency and the Securities and Exchange Commission have provided, than it is to be persuaded that existing and somewhat ancient legislation requires that result. Policy considerations are for the Congress and not for this Court.

I recognize and am fully aware of the factors and of the economic considerations that led to the enactment of the Glass-Steagall Act. The second and third decades of this century are not the happiest chapter in the history of American banking. Deep national concerns emerged from the distressful experiences of those years and from the sad ends to which certain banking practices of that time had led the industry. But those then-prevailing conditions, the legislative history, and the remedy Congress provided, prompt me to conclude that what was proscribed was the involvement and activity of a national bank in investment, as contrasted with commercial, banking, in underwriting and issuing, and in acquiring speculative securities for its own account. These were the banking sins of that time.

The propriety, however, of a national bank's acting, when not in contravention of state or local law, as an *inter vivos* or testamentary trustee, as an executor or administrator, as a guardian or committee, as a custodian, and, indeed, as an agent for the individual customer's securities and funds, see *Carcaba* v. *McNair*, 68 F. 2d 795, 797 (CA5 1934), cert. denied, 292 U. S. 646, is not, and could not be, questioned by the petitioners here or by the Court. This being so, there is, for me, an element of illogic in the ready admission by all concerned, on the one hand, that a national bank has the power to manage, by way of a common trust arrangement, those funds that it holds as fiduciary in the technical sense, and to admin-

ister separate agency accounts, and in the rejection, on the other hand, of the propriety of the bank's placing agency assets into a mutual investment fund. The Court draws its decisional line between the two. I find it impossible to locate any statutory root for that line drawing. To use the Glass-Steagall Act as a tool for that distinction is, I think, a fundamental misconception of the statute.

Accordingly, I am not convinced that the Congress, by that Act or otherwise, as yet has proscribed the banking endeavors under challenge here by competitors in a highly competitive field. None of the judges of the Court of Appeals was so convinced, and neither was the Comptroller of the Currency whose expertise the Court concedes. I would leave to Congress the privilege of now prohibiting such national bank activity if that is its intent and desire.

In Parts IV and V of its opinion the Court outlines hazards that are present when a bank indulges in specified activities. The Court then states, in the last paragraph of Part V, that those hazards are not present when a bank undertakes to purchase stock for individual customers, or to commingle assets held in its several fiduciary capacities, and the like. I must disagree. It seems to me that exactly the same hazards are indeed present. A bank offers its fiduciary services in an atmosphere of vigorous competition. One need only observe the current and continuous advertising of claimed fiduciary skills to know that this is so and that the business is one for profit. In the fiduciary area a bank is engaged in direct competition with other investment concepts and with nonbanking fiduciaries. Failure or misadventure of a single trust may constitute a threat to public confidence among the bank's other trust beneficiaries, prospective trustors, and even the commercial activities of the bank itself. It has an inevitable adverse effect upon the bank's fulfillment of what is fashionably described today as its "full service."

Thus I feel that the Court overstates its case when it seeks to diminish the significance of these hazards in the fiduciary area as contrasted with mutual fund operation. After all, we deal here with something akin to the traditional banking function and with a device that makes available for the small investor what is already available for the large investor by way of the individual agency account.

What the Court decries in the investment fund is the combination of three banking operations, each concededly permissible: acting as agent for the customer, purchasing for that customer, and pooling assets. It is said that "the union of these powers" gives birth to something "of a different character" and is statutorily prohibited. I doubt that those three powers, each allowed by the controlling statutes, somehow operate in combination to produce something forbidden by those same controlling statutes, and I doubt that the unitization is something more than or something different from the mere sum of its parts and that it thereby expands to achieve offensiveness under the Glass-Steagall Act.

With my position as to the Act only a minority one, detailed discussion of the additional issue, raised in No. 59, as to the propriety of the exemption granted by the Securities and Exchange Commission, would be superfluous. Suffice it to say that I am in accord with the views expressed in the respective opinions on this issue in the Court of Appeals, 136 U. S. App. D. C. 241, 249–253, 266, 420 F. 2d 83, 91–95, and 108, and, in particular, by Chief Judge Bazelon when he carefully examined the four "danger zones" considered by the SEC and the protections erected against them, and then concurred in the Commission's exercise of judgment. I, too, feel that the Commission did not act arbitrarily or exceed its statutory authority and that its determination deserves support here.

I would affirm the judgments of the Court of Appeals.

WILLIAMS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81. Argued October 21, 1970—Decided April 5, 1971*

In No. 81, here on direct review, petitioner was convicted of selling narcotics after a trial in which heroin seized in a search incident to his arrest was introduced into evidence. The Court of Appeals affirmed, holding that the intervening decision in *Chimel* v. *California*, 395 U. S. 752, narrowing the scope of permissible searches incident to arrest, was not to be retroactively applied to searches antedating the date it was decided, and that the search was valid under pre-*Chimel* law. Evidence at the trial of petitioner in No. 82 included marked bills seized during a pre-*Chimel* search of his apartment following his arrest on narcotics charges. The arrest and search were upheld at trial, on direct appeal, and in the District Court and Court of Appeals in proceedings under 28 U. S. C. § 2255. *Held:* The judgments are affirmed. Pp. 649–666, 699–700.

No. 81, 418 F. 2d 159, and No. 82, affirmed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that *Chimel*, *supra*, is not retroactive and should not be applied to searches conducted prior to the date of that decision. Pp. 649–659.

(a) Where the major purpose of a new constitutional standard is not to overcome an aspect of a criminal trial that substantially impairs the truth-finding function and thus raises serious questions about the accuracy of guilty verdicts in past trials, the new rule does not require retrospective application. P. 653.

(b) The Constitution does not require that pre-*Chimel* searches be measured by the new *Chimel* standards, *Desist* v. *United States*, 394 U. S. 244. Petitioners' rights under then-existing law were not violated either before or during trial, it is not claimed that the evidence was constitutionally insufficient to prove guilt, and the purpose of the exclusionary rule will be sufficiently implemented by applying *Chimel* to searches occurring after the date of decision in that case. P. 656.

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*Together with No. 82, *Elkanich* v. *United States*, also on certiorari to the same court.

(c) There is no constitutional difference between the applicability of *Chimel* to convictions here on direct appeal and those involving collateral proceedings, or between federal and state prisoners. Pp. 656–659.

MR. JUSTICE BRENNAN concluded that the question is not whether every person convicted through evidence obtained contrary to *Chimel, supra,* is guilty, but rather whether *Chimel* compels the conclusion that the invasion of petitioners' privacy, conducted in justifiable but mistaken reliance upon the continuing validity of pre-*Chimel* standards, requires the exclusion of the fruits of that invasion from the factfinding process. He agreed with the plurality opinion that it does not, and that the *Chimel* rule should not be applied retroactively. Pp. 660–665.

MR. JUSTICE BLACK concurred in the result on the ground that *Chimel, supra,* was wrongly decided. P. 660.

MR. JUSTICE HARLAN concluded that the judgment should be affirmed in No. 82, here on collateral review, as the search in that case should not be subjected to the requirements of *Chimel, supra,* since petitioner's conviction became final prior to *Chimel,* then-prevailing law validated the search, and the conviction was obtained by methods not fundamentally unfair. Pp. 699–700.

MR. JUSTICE MARSHALL concluded that the judgment in No. 82 should be affirmed, as the mode of analysis in the plurality opinion is appropriate in cases here on collateral review, and the *Chimel* rule should not be applied retroactively in such cases. Pp. 665–666.

WHITE, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. STEWART, J., filed a separate statement, *post,* p. 660. BRENNAN, J., filed an opinion concurring in the result, *post,* p. 660. HARLAN, J., filed an opinion concurring in the judgment in No. 82 and dissenting in No. 81, *post,* p. 675. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post,* p. 665. BLACK, J., filed a statement concurring in the result, *post,* p. 660. DOUGLAS, J., took no part in the consideration or decision of these cases.

Henry J. Florence argued the cause for petitioner in No. 81. With him on the brief was *Philip M. Haggerty. Charles A. Miller,* by appointment of the Court, 396 U. S. 1065, argued the cause and filed briefs for petitioner in No. 82.

James van R. Springer argued the cause for the United States in both cases. On the brief in No. 81 were *Solicitor General Griswold, Assistant Attorney General Wilson, Francis X. Beytagh, Jr., Richard B. Stone,* and *Beatrice Rosenberg.* On the brief in No. 82 were *Solicitor General Griswold, Assistant Attorney General Wilson, Mr. Beytagh,* and *Miss Rosenberg.*

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

The principal question in these cases is whether *Chimel* v. *California,* 395 U. S. 752 (1969), should be applied retroactively either to the direct review of petitioner Williams' conviction or in the collateral proceeding initiated by petitioner Elkanich.

I

In No. 81, federal agents on March 31, 1967, secured a warrant to arrest petitioner Williams on charges of selling narcotics in violation of 21 U. S. C. § 174. Williams was arrested at his home that night. A quantity of heroin was discovered and seized in the course of a search incident to the arrest. The trial court sustained the search and the heroin was introduced in evidence. Williams was convicted and sentenced to a 10-year prison term. The judgment of conviction was affirmed by the Court of Appeals for the Ninth Circuit. *Williams* v. *United States,* 418 F. 2d 159 (CA9 1969). That court held: (1) that our intervening decision in *Chimel* v. *California, supra,* was not retroactive and did not govern searches carried out prior to June 23, 1969, the date of that decision; and (2) that the search was valid under pre-*Chimel* law evidenced by *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), and *Harris* v. *United States,* 331 U. S. 145 (1947). The Court of Appeals also

rejected a claim that the search was invalid because the arrest was a mere pretext for an unwarranted search. We granted certiorari. 397 U. S. 986 (1970).

In No. 82, petitioner Elkanich was convicted on three counts of selling narcotics in violation of 21 U. S. C. § 174. He was sentenced to three concurrent 10-year sentences. The evidence introduced included marked bills given by federal agents to an intermediary to use in purchasing narcotics. The bills were seized during a search of petitioner's apartment following his arrest there. The search was challenged at trial on the ground that the arrest was invalid. Both the arrest and the incident search were upheld at trial and on direct appeal, *Elkanich* v. *United States*, 327 F. 2d 417 (CA9 1964), as well as by the District Court and the Court of Appeals in subsequent proceedings brought by petitioner under 28 U. S. C. § 2255. We granted the petition for certiorari to consider the effect, if any, of our *Chimel* decision, which intervened when the appeal from denial of petitioner's § 2255 application was pending in the Court of Appeals. 396 U. S. 1057 (1970). We affirm the judgments in both cases.

II

Aside from an insubstantial claim by Williams that his arrest was invalid,[1] neither petitioner in this Court suggests that his conviction was unconstitutionally ob-

[1] The Court of Appeals correctly rejected Williams' claim that his arrest was a pretext to make an otherwise invalid search. *Williams* v. *United States*, 418 F. 2d 159, 160–161 (CA9 1969). In his petition for certiorari, Williams also argued that there was insufficient proof of his knowledge of and control over the heroin found in the incidental search of his home, and thus that the Government had failed to prove constructive possession. This claim was neither briefed nor argued by the parties, and we decline to disturb the judgment of the Court of Appeals rejecting it. See 418 F. 2d, at 162–163.

tained; no evidence and no procedures were employed at or before trial that violated any then-governing constitutional norms. Concededly, the evidence seized incident to the arrest of both petitioners was both properly seized and admitted under the Fourth Amendment as construed and applied in *Harris* in 1947 and *Rabinowitz* in 1950. Both *Harris* and *Rabinowitz*, however, were disapproved by *Chimel*. That case considerably narrowed the permissible scope of searches incident to arrest, and petitioners argue that the searches carried out in these cases, if judged by *Chimel* standards, were unreasonable under the Fourth Amendment and the evidence seized inadmissible at trial.[2] However, we reaffirm our

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[2] Petitioner Williams was arrested pursuant to a warrant in the living room of his residence shortly after midnight. Eight officers were involved, and the entire house was searched for a period of about one hour and 45 minutes. The heroin introduced at trial was found in a container on a closet shelf in one of the bedrooms. *Williams, supra,* n. 1, at 161. The Government does not argue that this search incident to arrest complies with *Chimel*.

Elkanich was arrested without a warrant in his apartment. He does not argue that the arresting agents did not have probable cause to arrest but asserts that the search violated the Fourth Amendment. Three agents came to petitioner's apartment, and, after the door was opened by his wife in response to a knock, entered and immediately arrested petitioner. After handcuffing Elkanich, the agent in charge called for assistance. Three more agents arrived within 15 minutes, and they searched the four-room apartment for over an hour. The supervising agent asked petitioner if he had any large sums of cash, guns, "or anything of that kind" in the apartment. Petitioner at first said no, but later indicated there was some money in a broom closet. The agent found $500 above the molding at the top of the closet, returned to the living room, and searched petitioner and his wife, finding $200 on each of them. Another agent then found a second roll of bills above the molding in the broom closet, this one totaling about $1,000. Two other items later introduced in evidence were seized from a closet in the living room. Of the total of nearly $2,000 seized, $1,550 consisted of marked bills used by an undercover agent to

recent decisions in like situations: *Chimel* is not retroactive and is not applicable to searches conducted prior to the decision in that case. *Desist* v. *United States*, 394 U. S. 244 (1969).

In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), we declined to give complete retroactive effect to the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Relying on prior cases, we firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored. Since that time, we have held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights.[3] Nor have we accepted as a dividing line

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purchase narcotics from one Rios, whom petitioner was alleged to be supplying.

The Government here argues that exigent circumstances justify the search without a warrant. The argument is that the presence of petitioner's wife in the apartment left the agents only two choices: (1) to postpone searching until a warrant could be secured, a course which would entail either some sort of control over the wife's activity or a risk that evidence would disappear; or (2) to search the apartment immediately, as they did.

Because of our resolution of the retroactivity question, we find it unnecessary to pass on this contention.

[3] Many of the cases are discussed in the majority and dissenting opinions in *Desist* v. *United States*, 394 U. S. 244 (1969). These cases, and the general question of prospective effect for judicial decisions, have generated a substantial amount of commentary. See generally Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965); Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time

the suggested distinction between cases on direct review and those arising on collateral attack.[4] Rather we have proceeded to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter, supra,* at 629.[5]

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and Law, 79 Harv. L. Rev. 56 (1965); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966); Spruill, The Effect of an Overruling Decision, 18 N. C. L. Rev. 199 (1940); Note, Retroactivity of Criminal Procedure Decisions, 55 Iowa L. Rev. 1309 (1970); Comment, *Linkletter, Shott,* and the Retroactivity Problem in *Escobedo,* 64 Mich. L. Rev. 832 (1966); Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962). Cf. Kitch, The Supreme Court's Code of Criminal Procedure: 1968–1969 Edition, 1969 Sup. Ct. Rev. 155, 183–200.

[4] See *post,* p. 675 (HARLAN, J., concurring in judgments and dissenting). Compare Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965), with Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

In rejecting the distinction between cases pending on direct review and those on collateral attack, the Court in *Johnson* v. *New Jersey,* 384 U. S. 719, 732 (1966), stated:

"Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced."

[5] In our more recent opinions dealing with the retroactive sweep of our decisions in the field of criminal procedure, the approach mandated by *Linkletter* has come to be summarized in terms of a threefold analysis directed at discovering:

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards,

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.[6] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials. *Mapp* v. *Ohio* cast no doubt on the relevance or probity of illegally seized evidence but excluded it from criminal trials to deter official invasions of individual privacy protected by the Fourth Amendment. *Katz* v. *United States*, 389 U. S. 347 (1967), overruled *Olmstead* v. *United States*, 277 U. S. 438 (1928), and *Gold-*

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and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall v. *Denno*, 388 U. S. 293, 297 (1967); see also *Desist* v. *United States*, 394 U. S. 244, 249 (1969).

[6] See, *e. g.*, *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968) (giving retroactive effect to the right to counsel provided in *White* v. *Maryland*, 373 U. S. 59 (1963)); *McConnell* v. *Rhay*, 393 U. S. 2 (1968) (giving retroactive effect to the right to counsel provided in *Mempa* v. *Rhay*, 389 U. S. 128 (1967)); *Berger* v. *California*, 393 U. S. 314 (1969) (giving retroactive effect to *Barber* v. *Page*, 390 U. S. 719 (1968)); *Roberts* v. *Russell*, 392 U. S. 293 (1968) (giving retroactive effect to *Bruton* v. *United States*, 391 U. S. 123 (1968)); *Jackson* v. *Denno*, 378 U. S. 368 (1964); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956).

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man v. *United States*, 316 U. S. 129 (1942), and gave expanded Fourth Amendment protection against nonconsensual eavesdropping. It followed that evidence obtained by nontrespassory electronic surveillance of a public telephone booth became subject to the exclusionary rule, which had been fashioned by the Court to exact compliance with the Amendment rather than to protect defendants from conviction on untrustworthy evidence. Thus the Court, when it came to consider the retroactivity of *Mapp* and *Katz*, was dealing with cases quite different from those situations where emerging constitutional doctrine casts such doubt upon the soundness of some aspect of prior trials that State and Federal Governments were disentitled from further pursuing the goals of their criminal law against defendants convicted in such prior trials.

The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all then-applicable constitutional norms. In both cases the government involved had a concededly guilty defendant in custody and substantial unsatisfied interests in achieving with respect to such defendant whatever deterrent and rehabilitative goals underlay its criminal justice system. Each defendant, Linkletter by the habeas corpus route, and Desist on direct appeal, claimed the benefit of a later decided case and demanded a new trial. But ordering new trials would have involved not only expense and effort but the inevitable risk of unavailable witnesses and faulty memories; the authorities might not have had the evidence they once had and might have been foreclosed from obtaining other evidence they might have secured had they known the evidence they were using was constitutionally suspect. Moreover, it was not essential to the deterrent purpose of the exclusionary rule that *Mapp* and *Katz* be given retroactive effect; indeed that purpose would have been only mar-

ginally furthered by extending relief to Linkletter, Desist, and all others in comparable situations. In these circumstances, we found no constitutional warrant for setting aside either conviction.[7]

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[7] The Fourth Amendment cases do not stand alone. We have reached similar results in holding nonretroactive new interpretations of the Fifth Amendment's privilege against compelled self-incrimination, although some ramifications of the privilege have more connection with trustworthy results than does the exclusionary rule designed to enforce the Fourth Amendment. See *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966); *Desist* v. *United States*, 394 U. S., at 249–250, n. 14; cf. *Mackey* v. *United States*, *post*, at 674–675. So, too, the right to jury trial secured by the Sixth Amendment "generally tends to prevent arbitrariness and repression," *DeStefano* v. *Woods*, 392 U. S. 631, 633 (1968), and the holdings in *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), carry implications for the reliability of identification testimony. But both *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), obligating the States to recognize the right to jury trial by virtue of the Fourteenth and Sixth Amendments, and *Wade* and *Gilbert* were applied only prospectively in view of the countervailing considerations that retroactivity would entail. *DeStefano* v. *Woods*, *supra*; *Stovall* v. *Denno*, 388 U. S. 293 (1967).

In both *Johnson* and *Stovall*, we frankly acknowledged that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" 388 U. S., at 298. Where we have been unable to conclude that the use of such a "condemned practice" in past criminal trials presents substantial likelihood that the results of a number of those trials were factually incorrect, we have not accorded retroactive effect to the decision condemning that practice. See *e. g.*, *DeStefano*, 392 U. S., at 633–634 (quoting *Duncan*): "'We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'"

Our Brother HARLAN criticizes these decisions, stating that he finds "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values." *Post*, at 695. Earlier, he suggests that "those new rules cognizable on habeas ought to be

III

Considering that *Desist* represents the sound approach to retroactivity claims in Fourth Amendment cases, we are confident that we are not constitutionally bound to apply the standards of *Chimel* to the cases brought here by Elkanich and Williams. Both petitioners were duly convicted when judged by the then-existing law; the authorities violated neither petitioner's rights either before or at trial. No claim is made that the evidence against them was constitutionally insufficient to prove their guilt. And the *Chimel* rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after *Chimel* was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision.

IV

Both from the course of decision since *Linkletter* and from what has been said in this opinion, it should be clear that we find no constitutional difference between the applicability of *Chimel* to those prior convictions that are here on direct appeal and those involving collateral proceedings. Nor in constitutional terms is there any difference between state and federal prisoners insofar as retroactive application to their cases is concerned.

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defined, not by the 'truth-determining' test, but by the *Palko* [v. *Connecticut*, 302 U. S. 319, 325 (1937)] test." *Post*, at 694. But operating within the confines of a rule that seeks to determine, *inter alia*, whether a newly proscribed practice has probably produced factually improper results in cases where it was employed is surely to proceed with more definite bearings than are provided by a "test" that seeks to define those procedures which are "implicit in the concept of ordered liberty." See n. 8, *infra*.

We accept MR. JUSTICE HARLAN's truism, stated in dissent, that our task is to adjudicate cases and the issues they present, including constitutional questions where necessary to dispose of the controversy. Hence, we must resolve the Fourth Amendment issues raised by Elkanich and Williams. But this leaves the question of how those issues should be resolved. Assuming that neither has a colorable claim under the pre-*Chimel* law but both would be entitled to relief if *Chimel* is the governing standard, which constitutional standard is to rule these cases? This is the unavoidable threshold issue—as MR. JUSTICE HARLAN describes it in discussing cases before us on collateral review, a "choice of law problem." *Post*, at 682.

The opinions filed in these cases offer various answers to the question. We would judge the claims in both *Williams* and *Elkanich* by the law prevailing when petitioners were searched. Surely this resolution is no more legislative, and no less judicial, than that of MR. JUSTICE HARLAN. He feels compelled to apply new overruling decisions to cases here on direct review but deems himself free, with some vague and inscrutable exceptions,[8] to refuse the benefits of new decisions to those defendants who collaterally attack their convictions. The latter judgment seems to rest chiefly on his own assessment of the public interest in achieving finality in criminal litigation. The former is not explained at all except by repeated assertions that cases here on direct review are different.[9] But we have no authority to upset

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[8] Compare MR. JUSTICE HARLAN's treatment of petitioner Elkanich's case, *post*, at 699–700, with his resolution of *Mackey*, *post*, at 700–701. Cf. his discussion of *Gideon* and its application to cases on collateral review. *Post*, at 693–694.

[9] Let us assume that X and Y are accomplices in a murder and that they are tried separately in the state courts. For any one of several reasons, including reversal and retrial or consensual delay, X's case proceeds slowly through direct review while Y's conviction

criminal convictions at will. Does the Constitution compel us to apply *Chimel* retroactively and set aside Williams' conviction when he was convicted on sound evidence secured in conformity with the then-applicable constitutional law as announced by this Court? As we have said, we think not—no more so than it compels applying the teachings of *Chimel* in reviewing the denial of Elkanich's petition for collateral relief. Other than considering it inherent in the process of judicial review, MR. JUSTICE HARLAN does not directly address the question. Nor does he purport to explain how the purpose of the exclusionary rule fashioned by this Court as

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is quickly affirmed. Assume further that after X's conviction is affirmed by the State's highest court, this Court holds that a practice employed in both the X and Y trials violates the Constitution. Both X and Y come before this Court at the same time seeking to have the new rule applied to their cases—X on direct review and Y by way of collateral attack. (Or, X and Y could be petitioners tried for wholly different offenses in different States or in different districts in the federal system. X, tried in a crowded jurisdiction and having appellate review in a busy judicial system, would be before this Court on direct review, while Y, whose case arose before less congested courts, would most likely be here on collateral attack.)

Under MR. JUSTICE HARLAN's approach, X automatically receives the benefit of the new rule—because we are a court of law somehow bound to decide all cases here on direct review in accordance with the law as it exists when the case arrives for consideration. Although we remain a court of law, Y may or may not receive the benefit of the new rule, the result depending on whether the new rule is designed to correct a practice that has come, over time, to shock our Brother's conscience. Under our approach today, the results as to X and Y would be consistent, as they should be.

As a perceptive jurist has remarked:

"[W]hen a court is itself changing the law by an overruling decision, its determination of prospectivity or retroactivity should not depend upon the stage in the judicial process that a particular case has reached when the change is made. Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system." Schaefer, *supra*, n. 3, at 645.

a Fourth Amendment mechanism will be at all furthered by mechanically affording Williams the benefit of *Chimel*.

We are also unmoved by the argument that since the petitioners in cases like *Mapp*, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Katz* have been given relief, when it was only by chance that their cases first brought those issues here for decision, it is unfair to deny relief to others whose cases are as thoroughly deserving. It would follow from this argument that all previous convictions that would be vulnerable if they occurred today would be set aside. Surely this is the tail wagging the dog. The argument was fairly met and adequately disposed of in *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967). We see no reason to repeat or reconsider what we said in that case.

It is urged that the prevailing approach to retroactivity involves confusing problems of identifying those "new" constitutional interpretations that so change the law that prospectivity is arguably the proper course. But we have no such problems in these cases since to reach the result it did the Court in *Chimel* found it necessary to disapprove *Harris* and *Rabinowitz* and under those cases the search in *Chimel* and the searches now before us would have been deemed reasonable for Fourth Amendment purposes. Moreover, the idea that circumstances may require prospectivity for judicial decisions construing the Constitution is an old one; it is not a new problem for the courts. It has not proved unmanageable and we doubt that courts and judges have suddenly lost the competence to deal with the problems that it may present.[10]

The judgments are

Affirmed.

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[10] Nor is the problem "greatly ameliorated," *post*, at 695, by the approach suggested by MR. JUSTICE HARLAN. For whenever our Brother HARLAN considers a case on collateral review, he must of

While joining the plurality opinion, MR. JUSTICE STEWART would also affirm the judgment in No. 82, *Elkanich* v. *United States*, on the alternative ground that the issue presented is not one cognizable in a proceeding brought under 28 U. S. C. § 2255. See *Harris* v. *Nelson*, 394 U. S. 286, 307 (dissenting opinion); *Kaufman* v. *United States*, 394 U. S. 217, 242 (dissenting opinion); *Chambers* v. *Maroney*, 399 U. S. 42, 54 (concurring opinion).

MR. JUSTICE BLACK, while adhering to his opinion in *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965), concurs in the result on the ground that he believes that *Chimel* v. *California*, 395 U. S. 752 (1969), was wrongly decided.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

[For opinion of MR. JUSTICE HARLAN, concurring in the judgment in No. 82 and dissenting in No. 81, see *post*, p. 675.]

MR. JUSTICE BRENNAN, concurring in the result.

Chimel v. *California*, 395 U. S. 752 (1969), applied principles established by a long line of cases[1] to determine the permissible scope of a warrantless search sought

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necessity determine which of the prisoner's claims are grounded on "new" rules in deciding what "the law in effect [was] when a conviction became final," *post*, at 692.

[1] Our cases have settled the proposition that the Fourth Amendment requires agents of the Government to obtain prior judicial approval of all searches and seizures, see, *e. g.*, *Davis* v. *Mississippi*, 394 U. S. 721, 728 (1969); *Katz* v. *United States*, 389 U. S. 347, 356–357 (1967); *James* v. *Louisiana*, 382 U. S. 36 (1965); *Preston* v. *United States*, 376 U. S. 364, 368 (1964); *McDonald* v. *United States*, 335 U. S. 451, 455–456 (1948); *Agnello* v. *United States*, 269 U. S. 20, 33 (1925), subject only to a few narrow and well-delineated exceptions grounded upon urgent necessity. *Terry* v. *Ohio*, 392 U. S. 1, 16–27 (1968); see *Katz* v. *United States*, *supra*,

to be justified as the necessary incident of a lawful arrest. But in applying these principles to the circumstances involved in *Chimel*, we were compelled to overrule *Harris* v. *United States*, 331 U. S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U. S. 56 (1950). *Harris* and *Rabinowitz* were founded on "little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Chimel, supra*, at 764–765; see *United States* v. *Rabinowitz, supra*, at 83 (Frankfurter, J., dissenting). By the time of *Chimel*, this view had long since been rejected; but until that day, *Harris* and *Rabinowitz* survived as direct authority for the proposition that a lawful arrest would somehow justify a warrantless search of the premises on which the arrest was made, beyond the immediate reach of the person arrested.[2]

Accordingly, we are presented in these cases with the question whether *Chimel* should be applied to require the exclusion at trial of evidence which is the fruit of a search, carried out before our decision in *Chimel*, and which would be lawful if measured by the standards of *Harris* and *Rabinowitz*, but unlawful under the rule of *Chimel*. The Court today holds that the fruits of searches made prior to our decision in *Chimel* may be used in criminal trials if the searches may be justified

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at 357 n. 19 and cases cited; cf. *Chambers* v. *Maroney*, 399 U. S. 42 (1970). And, in all events, "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* v. *Ohio, supra*, at 19, quoting *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (concurring opinion).

[2] Long before *Chimel*, of course, we had made clear that *Harris* and *Rabinowitz* were not themselves without limit. *James* v. *Louisiana*, 382 U. S. 36 (1965); *Kremen* v. *United States*, 353 U. S. 346 (1957); see *Von Cleef* v. *New Jersey*, 395 U. S. 814 (1969); *Stanley* v. *Georgia*, 394 U. S. 557, 569–572 (1969) (STEWART, J., concurring in result).

under the standards of *Harris* and *Rabinowitz* as those standards had previously been applied. See, *e. g.*, *Von Cleef* v. *New Jersey*, 395 U. S. 814 (1969). I agree. In *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967), we said that

> "[t]he criteria guiding resolution of [this] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

All three factors imply that the rule of *Chimel* should be applied only to searches carried out after *Chimel* was decided.

I

Like the Fifth Amendment's protection against compulsory self-incrimination, the warrant requirement of the Fourth Amendment stakes out boundaries beyond which the government may not tread in forcing evidence or information from its citizens. When coercion, impermissible under the Fifth Amendment, has actually produced an involuntary statement, we have invariably held that the fruits of that unconstitutional coercion may not be used to prosecute the individual involved for crime. *E. g.*, *Rochin* v. *California*, 342 U. S. 165, 173 (1952) (Frankfurter, J.); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Boyd* v. *United States*, 116 U. S. 616, 630–635, 638 (1886).[3] Exclusion of statements impermissibly coerced is not merely a device to deter government agents from improper conduct in the future. Exclusion of coerced testimony is part and parcel of the privilege

[3] Under what circumstances the Fifth Amendment requires that the individual concerned be granted immunity from prosecution for the matters revealed in his statements is a question not pertinent here. See *Piccirillo* v. *New York*, 400 U. S. 548, 561–573 (1971) (BRENNAN, J., dissenting).

against self-incrimination. Likewise, when a search impermissible under the Fourth Amendment results in the seizure of evidence, exclusion of the fruits of that unconstitutional invasion is required not merely in hope of deterring unconstitutional searches in the future, but in order to vindicate the right of privacy guaranteed by the Fourth Amendment. See *Boyd* v. *United States, supra; Weeks* v. *United States,* 232 U. S. 383, 390–394, 398 (1914); *Mapp* v. *Ohio,* 367 U. S. 643, 656, 660 (1961). Exclusion of evidence in order to vindicate the right of privacy, however, does not improve the reliability of the factfinding process at trial. See *Desist* v. *United States,* 394 U. S. 244, 249–250 (1969), and cases cited. Accordingly, this factor does not require that the standards of *Chimel* be retroactively applied. *Desist* v. *United States, supra; Stovall* v. *Denno,* 388 U. S., at 297–299.

II

The factor of reliance by law-enforcement officials on *Harris* and *Rabinowitz* points in the same direction. As we recognized in *Chimel* itself, Fourth Amendment jurisprudence has often followed a tortuous path. 395 U. S., at 755–762. So long as *Harris* and *Rabinowitz* were not visibly overruled, we cannot be surprised that policemen and those who offer them guidance may not have scrutinized their doctrinal underpinnings for signs of erosion. And the extent of reliance, it appears, has been considerable. The Government represents, and petitioners do not seriously dispute, that a very substantial number of searches have been carried out in reliance upon these cases. In many of these, there is no reason to doubt that a warrant could and would have been obtained if the officials involved had been aware that a warrant would be required. This factor as well, therefore, implies that *Chimel* should have only prospective application.

III

Finally, we must evaluate the probable impact of retroactive application on the administration of justice. Persons convicted through the use of evidence inadmissible under *Chimel* have been found to have engaged in conduct that the government involved may legitimately punish. *Chimel* casts no doubt upon the propriety of the government's interest in punishing those who have engaged in such conduct. Accordingly, it may fairly be assumed that retroactive application of its standards would result in a substantial number of retrials. Yet *Chimel* likewise casts no doubt upon the reliability of the initial determination of guilt at the previous trial. Moreover, the legitimate reliance of law-enforcement officials on *Harris* and *Rabinowitz*, as already noted, may well have led them to conduct a warrantless search merely because the warrant requirement, although easily satisfied, was understandably not understood. The consequence of this is that retroactive application of the standards applied in *Chimel* would impose a substantial burden upon the federal and state judicial systems, while serving neither to redress knowing violations of individual privacy nor to protect a class of persons the government has no legitimate interest in punishing.

IV

This is not to say, however, that petitioners are to be denied relief because they are probably guilty. "[T]here is always in litigation a margin of error, representing error in factfinding." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). The constitutional requirement that guilt in criminal cases be proved beyond a reasonable doubt serves to limit, but cannot eliminate, the number of criminal defendants found guilty who are in fact innocent. See *In re Winship*, 397 U. S. 358, 370–372 (1970) (con-

curring opinion). In the present cases, both petitioners asserted their innocence by pleading not guilty and going to trial; and petitioner in No. 81, whose case is here on direct review, raised in his petition for certiorari the question whether the evidence presented at trial was sufficient to support a finding of guilt. But this Court does not sit to review such questions. In denying retroactive application to the rule of *Chimel*, we neither do nor could determine that every person convicted by the use of evidence obtained contrary to that rule is in fact guilty of the crime of which he was convicted. The question we face is not the legitimacy or sincerity of petitioners' claims of innocence, or indeed whether any such claims are expressly made at all. It is, instead, whether *Chimel* v. *California* compels us to conclude that the invasion of petitioners' privacy, conducted in justifiable but mistaken reliance upon the continuing validity of *Harris* and *Rabinowitz*, requires the exclusion of the fruits of that invasion from the factfinding process at trial. I agree with the Court that it does not, and that the standards of *Chimel* should apply only to searches carried out after June 23, 1969.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

After studying afresh the pattern of the Court's retroactivity decisions since *Linkletter* v. *Walker*, 381 U. S. 618 (1965), I conclude that a decision of this Court construing the Constitution should be applied retroactively to all cases involving criminal convictions not yet final at the time our decision is rendered. Sound jurisprudential reasoning, so well articulated by MR. JUSTICE HARLAN in his separate opinion covering the present cases, *post*, p. 675, in my view requires that cases still on direct review should receive full benefit of our supervening constitutional decisions. I am persuaded that

willingness to tolerate the inevitable costs and anomalies of the Court's current approach to retroactivity is incompatible with the judicial duty of principled review of convictions not yet final.

I disagree somewhat with MR. JUSTICE HARLAN as to the proper approach to retroactivity for cases arising on habeas corpus or other modes of collateral attack. In such cases I believe it is best to employ the three-part analysis that the plurality undertakes today in deciding the retroactivity of the rule in *Chimel* v. *California*, 395 U. S. 752 (1969). This mode of analysis was foreshadowed in *Linkletter*, where the question was whether the rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), should be applied on collateral review. The method commends itself, once the point of finality after direct review is passed, as a careful and appropriate way of adjudicating the "procedural" rights of litigants in view of the purposes of a new decisional rule and the concerns of effective law enforcement. In particular, if the purposes of a new rule implicate decisively the basic truth-determining function of the criminal trial, then I believe the rule should be given full retroactive application, for the required constitutional procedure itself would then stand as a concrete embodiment of "the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937).

In light of the above, I concur in the Court's disposition of No. 82. That case is before us on collateral review. For cases in such a posture the mode of analysis used by the plurality is appropriate, and I agree that the *Chimel* rule should not be applied retroactively to such cases.

No. 81 is before us on direct review. Since there is a clear violation of *Chimel* on the facts, I would reverse the judgment below, for I believe that the same constitutional rule should be applied to adjudicate the rights of the petitioner in No. 81 as was applied in Chimel's case.

Syllabus

MACKEY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 36. Argued October 21, 1970—Decided April 5, 1971

At petitioner's trial for income tax evasion, the Government used monthly wagering tax forms petitioner had filed, as required by statute, to show that the gross amount of wagers he reported, less business expenses, exceeded the gambling profits reported on his income tax returns. Petitioner objected on the ground that the forms were prejudicial and irrelevant, but he was convicted in 1964 and the Court of Appeals affirmed. After this Court's 1968 decisions in *Marchetti* v. *United States,* 390 U. S. 39, and *Grosso* v. *United States,* 390 U. S. 62, petitioner applied for postconviction relief on the ground that the Fifth Amendment barred the prosecution's use of the wagering tax forms. The District Court denied the application. The Court of Appeals affirmed, holding that *Marchetti* and *Grosso* would not be applied retroactively to overturn the earlier income tax evasion conviction based on the then-applicable constitutional principles. *Held:* The judgment is affirmed. Pp. 671–675, 700–701, 703–713.

411 F. 2d 504, affirmed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that *Marchetti* and *Grosso* are not to be applied retroactively, since no threat to the reliability of the factfinding process was involved in the use of the wagering tax forms at petitioner's trial. *Tehan* v. *Shott,* 382 U. S. 406; *Johnson* v. *New Jersey,* 384 U. S. 719; *Williams* v. *United States, ante,* p. 646. Pp. 671–675.

MR. JUSTICE HARLAN concluded that in this case, here on collateral review, the judgment should be affirmed, since he cannot say that the pre-*Marchetti* rule that prevailed at the time of petitioner's conviction, *viz.,* that the registration requirement and obligation to pay the gambling tax did not violate the Fifth Amendment, was so grossly erroneous as to work an inexcusable inequity against petitioner and that the then-existing justification for that result (that persons could avoid self-incrimination by ceasing to engage in illegal activities) is not without some force. Pp. 700–701.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that the Fifth Amendment does not bar the use of infor-

mation that, in furtherance of the general scheme of collecting taxes and enforcing the tax laws, required those in the business of accepting wagers to report their income, a situation readily distinguishable from that in *Marchetti* and *Grosso*, where the Amendment was held to bar forced disclosure of information that would have subjected the individual concerned to the "real and appreciable" hazard of self-incrimination for violating pervasive state or federal laws proscribing gambling. Pp. 703–713.

WHITE, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment, *post*, p. 675. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 702. DOUGLAS, J., filed a dissenting opinion, in which BLACK, J., joined, *post*, p. 713.

William M. Ward argued the cause and filed briefs for petitioner.

Matthew J. Zinn argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Mervyn Hamburg.*

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

An indictment was returned in March 1963 charging petitioner Fred T. Mackey in five counts of evading payment of income taxes by willfully preparing and causing to be prepared false and fraudulent tax returns for the years 1956 through 1960, in violation of 26 U. S. C. § 7201. On January 21, 1964, a jury in the District Court for the Northern District of Indiana found Mackey guilty on all five counts.[1] The conviction was affirmed on appeal by the Court of Appeals for the

[1] Petitioner received a sentence of five years' imprisonment and a fine of $10,000 on each count, the prison terms to be served concurrently.

Seventh Circuit in the spring of 1965. 345 F. 2d 499 (CA7), cert. denied, 382 U. S. 824 (1965).

At petitioner's trial, the Government used the net-worth method to prove evasion of income taxes.[2] As part of its case, it introduced 60 wagering excise tax returns—one for every month of each of the five years covered by the indictment—filed by petitioner pursuant to 26 U. S. C. § 4401. A summary exhibit prepared from these returns and petitioner's income tax returns were also introduced, and an Internal Revenue Service technical advisor testified that for the years in question the totals of the gross amount of wagers reported on the wagering tax returns, less the expenses of running petitioner's "policy wheel" operation as reported on his annual income tax returns, exceeded the net profits from gambling reported on the petitioner's income tax returns. Defense counsel objected to the introduction of these exhibits, arguing that they were prejudicial, inflammatory, and irrelevant; the Government responded that the wagering tax returns and the summary exhibit were relevant because they showed a likely source of unreported income. The exhibits were admitted, and the Court of Appeals found, without specific discussion, no error in the ruling.[3]

On January 29, 1968, this Court held that the Fifth Amendment privilege against compulsory self-incrimination was a valid defense to a prosecution for failure to register as a gambler and to pay the related occupational and gambling excise taxes under 26 U. S. C.

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[2] This method of prosecution is discussed and approved in *Holland* v. *United States*, 348 U. S. 121 (1954); *Friedberg* v. *United States*, 348 U. S. 142 (1954); *Smith* v. *United States*, 348 U. S. 147 (1954); *United States* v. *Calderon*, 348 U. S. 160 (1954).

[3] In rejecting petitioner's application for relief under 28 U. S. C. § 2255, the District Judge so read the Court of Appeals' earlier opinion. See App. 28.

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§§ 4401, 4411, 4412. *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). Petitioner, who had begun serving his sentence in December 1965, filed on February 12, 1968, a motion pursuant to 28 U. S. C. § 2255 to vacate his sentence and set aside the judgment of conviction on authority of *Marchetti* and *Grosso*. The motion was denied by the District Court for the Northern District of Indiana,[4] and the Court of Appeals affirmed. 411 F. 2d 504 (CA7 1969).

Although the Court of Appeals suggested that petitioner's argument that he had not waived the Fifth Amendment claim by his failure to raise it at trial was open to question, 411 F. 2d, at 506–507, it specifically held that *Marchetti* and *Grosso* would not be applied retroactively to upset a pre-*Marchetti* conviction for

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[4] The District Court advanced several reasons for denying petitioner's application. See App. 27–38. Noting that with gambling excise tax returns "there is little danger of their unreliability other than their possible understatement of liability," *id.*, at 32, the District Judge held that *Marchetti* and *Grosso* should not be applied to petitioner's case:

"An examination of these and other cases reveals no instance where the [Supreme] Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact finding process had not been jeopardized. The briefs for [Mackey] have suggested none. In [petitioner] Mackey's trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey's attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error." *Id.*, at 36.

We note in reference to the last point mentioned by the District Judge that at trial the court's charge to the jury included several strong admonitions to the effect that the question of whether any business run by petitioner was legal or illegal was irrelevant to the offense charged in the indictment—failure to report income for five years. See Brief for the United States 11.

evading payment of income tax simply because the wagering excise tax returns filed pursuant to 26 U. S. C. § 4401 were introduced in evidence at trial. Employing the threefold analysis set forth in our retroactivity decisions, see, *e. g., Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), the Court of Appeals found that law enforcement officials had relied on the old rule, that retroactive application of *Marchetti* and *Grosso* in cases such as petitioner's would have a substantial impact on the administration of justice, and that "[t]he unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws." 411 F. 2d, at 509. We granted certiorari. 396 U. S. 954.

I

In *United States* v. *Kahriger,* 345 U. S. 22 (1953), a prosecution for failure to register and pay the gambling tax, this Court held that the registration requirement and the obligation to pay the gambling tax did not violate the Fifth Amendment. The Court construed the privilege as relating "only to past acts, not to future acts that may or may not be committed. . . . Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U. S., at 32–33. *Lewis* v. *United States,* 348 U. S. 419 (1955), reaffirmed this construction of the Fifth Amendment. Thirteen years later we could not agree with what was deemed an "excessively narrow" view of the scope of the privilege. 390 U. S., at 52. The "force of the constitutional prohibition is [not] diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to

evidence." 390 U. S., at 54. The gambling registration and tax requirements were held to present substantial risks of self-incrimination and therefore to be unenforceable; imposition of criminal penalties for noncompliance was an impermissible burden on the exercise of the privilege.

Until *Marchetti* and *Grosso*, then, the registration and gambling tax provisions had the express approval of this Court; the Fifth Amendment provided no defense to a criminal prosecution for failure to comply. But as of January 29, 1968, the privilege was expanded to excuse noncompliance. The statutory requirement to register and file gambling tax returns was held to compel self-incrimination and the privilege became a complete defense to a criminal prosecution for failure to register and pay the related taxes. It followed that the registration and excise tax returns filed in response to the statutory command were compelled statements within the meaning of the Fifth Amendment and accordingly were inadmissible in evidence as part of the prosecution's case in chief. The question before us is whether the *Marchetti-Grosso* rule applies retroactively and invalidates Mackey's conviction because his gambling excise tax returns were introduced against him at his trial for income tax evasion.

We have today reaffirmed the nonretroactivity of decisions overruling prior constructions of the Fourth Amendment. *Williams* v. *United States* and *Elkanich* v. *United States, ante*, p. 646. The decision in those cases represents the approach to the question of when to accord retroactive sweep to a new constitutional rule taken by this Court in the line of cases from *Linkletter* [5] in 1965 to *Desist* [6] in 1969. Among those cases were two which determined that earlier decisions extending the

[5] *Linkletter* v. *Walker*, 381 U. S. 618 (1965).

[6] *Desist* v. *United States*, 394 U. S. 244 (1969).

reach of the Fifth Amendment privilege against compelled self-incrimination would not be retroactively applied to invalidate prior convictions that in all respects conformed to the then-controlling law.

In *Tehan* v. *Shott*, 382 U. S. 406 (1966), the Court declined to apply the rule of *Griffin* v. *California*, 380 U. S. 609 (1965), to prisoners seeking collateral relief. *Griffin* had construed the Fifth Amendment to forbid comment on defendants' failure to testify, thereby removing a burden from the exercise of the privilege against compulsory self-incrimination and further implementing its purpose. The basic purpose of the privilege, we said, was not related to "protecting the innocent from conviction," 382 U. S., at 415; the privilege "is not an adjunct to the ascertainment of truth," but is aimed at serving the complex of values on which it has historically rested. 382 U. S., at 416. Given this purpose, clear reliance on the pre-*Griffin* rules, and the frustration of state interests which retroactivity would have entailed, we refused relief to a state prisoner seeking collateral relief although the prosecutor's comment on his failure to take the stand at his trial would have infringed the new rule that was announced in *Griffin* and was being applied in contemporary trials.

Johnson v. *New Jersey*, 384 U. S. 719 (1966), reaffirmed this view of the Fifth Amendment by declining to apply the *Miranda*[7] rules to cases pending on direct review as well as to those involving applications for collateral relief. Stating that the "prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice," 384 U. S., at 729, the Court also recognized that the new rules to some extent did guard against the possibility of unreliable admissions given

[7] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

during custodial interrogation. *Id.*, at 730. The question, however, was one of "probabilities." The hazard of untrustworthy results in past trials was not sufficiently apparent to require retroactive application in view of the existing, well-defined remedies against the use of many involuntary confessions, the obvious fact that the new warnings had not been standard practice prior to *Miranda*, and the consequent disruption to the administration of the criminal law.

II

Guided by our decisions dealing with the retroactivity of new constitutional interpretations of the broad language of the Bill of Rights, we agree with the Court of Appeals that *Marchetti* and *Grosso* should not have any retroactive effect on Mackey's conviction. Petitioner was convicted in strict accordance with then-applicable constitutional norms. Mackey would have a significant claim only if *Marchetti* and *Grosso* must be given full retroactive sweep. But in overruling *Kahriger* and *Lewis*, the Court's purpose was to provide for a broader implementation of the Fifth Amendment privilege—a privilege that does not include at its core a concern for improving the reliability of the results reached at criminal trials. There is no indication in *Marchetti* or *Grosso* that one of the considerations which moved the Court to hold that the Congress could not constitutionally compel citizens to register as gamblers and file related tax returns was the probable unreliability of such statements once given. Petitioner has not advanced any objective considerations suggesting such unreliability. The wagering tax returns introduced in evidence at his trial have none of the characteristics, and hence none of the potential unreliability, of coerced confessions produced by "overt and obvious coercion." *Johnson*, 384 U. S., at 730. Nor does Mackey suggest that his returns—made under

oath—were inaccurate in any respect.[8] Thus, a gambling excise tax return, like physical evidence seized in violation of a new interpretation of the Fourth Amendment, is concededly relevant and probative even though obtained by the Government through means since defined by this Court as constitutionally objectionable. As in *Desist, Elkanich,* and *Williams,* the result here should be that a pre-*Marchetti* trial in which the Government employed such evidence is not set aside through retroactive application of the new constitutional principle.

The short of the matter is that *Marchetti* and *Grosso* raise not the slightest doubt about the accuracy of the verdict of guilt returned here. Under these circumstances, the principles represented by *Elkanich* and *Williams,* as well as by *Tehan* and *Johnson,* must control. For *Tehan* and *Johnson* indicate that even though decisions reinterpreting the Fifth Amendment may create marginal doubts as to the accuracy of the results of past trials, the purposes of those decisions are adequately served by prospective application. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the judgments in Nos. 36 and 82 and dissenting in No. 81.

These three cases have one question in common: the extent to which new constitutional rules prescribed by this Court for the conduct of criminal cases are applicable to other such cases which were litigated under different but then-prevailing constitutional rules.

One of these cases is before us on direct review, No. 81, *Williams,* the other two being here on collateral review, No. 82, *Elkanich,* and No. 36, *Mackey.* In each instance the new rule is held not applicable, and, in

[8] See n. 4, *supra.*

consequence, the judgments below are affirmed, without reaching the merits of the underlying questions presented. Two of the cases, *Williams* and *Elkanich*, involve the Court's decision in *Chimel* v. *California*, 395 U. S. 752 (1969), changing the rule as to the scope of permissible searches and seizures incident to a lawful arrest. The other case, *Mackey*, involves the Court's decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), changing the rule as to the application of the privilege against self-incrimination with respect to criminal prosecutions arising under the federal gambling tax statutes.

Today's decisions mark another milestone in the development of the Court's "retroactivity" doctrine, which came into being somewhat less than six years ago in *Linkletter* v. *Walker*, 381 U. S. 618 (1965). That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins* v. *Delaware*, 395 U. S. 213, 218 (1969). The upshot of this confluence of viewpoints was that the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim. See my dissenting opinion in *Desist* v. *United States*, 394 U. S. 244, 256–257 (1969). See also *United States* v. *United States Coin & Currency*, *post*, p. 728 (appendix to concurring opinion of BRENNAN, J.). It was this train of events that impelled me to suggest two Terms ago in *Desist* that the time had come for us

to pause to consider just where these haphazard developments might be leading us. That is what I had thought underlay the taking of these cases, and their companions, *United States* v. *United States Coin & Currency, post,* p. 715, and *Hill* v. *California, post,* p. 797. Regrettably, however, this opportunity has largely eventuated in little more than a reaffirmation of the post-*Linkletter* developments.

What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view. While I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time, I do believe that whether a new constitutional rule is to be given retroactive or simply prospective effect must be determined upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body.

I

At the outset, I think it is clear that choosing a binding, generally applicable interpretation of the Constitution presents a problem wholly different from that of choosing whether to apply the rule so evolved "retroactively" to other cases arising on *direct* review.

In adopting a particular constitutional principle, this Court very properly weighs the nature and purposes of various competing alternatives, including the extent to which a proposed rule will enhance the integrity of the criminal process and promote the efficient administration of justice, as well as the extent to which justifiable expectations have grown up surrounding one rule or another. Indeed, it is this very process of weighing such

factors that should constitute the core of our task in giving concrete embodiment to those constitutional commands that govern the procedures by which the State and Federal Governments enforce their criminal laws.

But we possess this awesome power of judicial review, this duty to bind coordinate branches of the federal system with our view of what the Constitution dictates, only because we are a court of law, an appellate court charged with the responsibility of adjudicating cases or controversies according to the law of the land and because the law applicable to any such dispute necessarily includes the Federal Constitution. That is the classic explanation for the basis of judicial review, an explanation first put forth by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 177–178 (1803), and from that day to this the sole continuing rationale for the exercise of this judicial power:

> "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . . .
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> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
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> . . . . . .
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> "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."

We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over

which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. If there is no need for an anti-majoritarian judicial control over the content of our legal system in nine cases precisely like that presented by Mr. Chimel's dispute with the State of California, it is hard to see the necessity, wisdom, or justification for imposing that control in the *Chimel* case itself. In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

The notion that cases before us on direct review need not be adjudicated in accordance with those legal princi-

ples governing at the time we are possessed of jurisdiction in the case entails additional significant untoward consequences. By this doctrine all other courts in this country are, in effect, reduced largely to the role of automatons, directed by us to apply mechanistically all then-settled federal constitutional concepts to every case before them. No longer do the inferior courts—and, in the constitutional realm, all courts are inferior to us—bear responsibility for developing or interpreting the Constitution. For it is a necessary corollary of this current retroactivity doctrine that an inferior court errs when it arrives at a result which this Court subsequently adopts but later decides must operate prospectively only. See my dissent in *Desist*, 394 U. S., at 259. Cf. *United States* v. *White*, *post*, p. 754 (Part II), and my dissenting opinion in that case, *post*, p. 768. See also *United States* v. *United States Coin & Currency*, *post*, p. 730 (WHITE, J., dissenting). Although it is necessary for the proper functioning of the federal system that this Court possess the last word on issues of federal constitutional law, it is intolerable that we take to ourselves the sole ability to speak to such problems.

Refusal to apply new constitutional rules to all cases arising on direct review may well substantially deter those whose financial resources are barely sufficient to withstand the costs of litigating to this Court, or attorneys who are willing to make sacrifices to perform their professional obligation in its broadest sense, from asserting rights bottomed on constitutional interpretations different from those currently prevailing in this Court. More importantly, it tends to cut this Court loose from the force of precedent, allowing us to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*, *Linkletter* v. *Walker*, 381 U. S., at 644 (BLACK, J., dissenting), a force which ought properly to bear on the

judicial resolution of any legal problem. Cf. *Moragne* v. *States Marine Lines*, 398 U. S. 375, 403 (1970).

One could catalogue virtually *ad infinitum* what I view as unacceptable ancillary consequences of this aspect of the Court's ambulatory retroactivity doctrine. For me, the fact that this doctrine entails an inexplicable and unjustifiable departure from the basic principle upon which rests the institution of judicial review is sufficient to render it untenable. I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was. Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land. That inquiry is, however, quite simply irrelevant in deciding, once a rule has been adopted as part of our legal fabric, which cases then pending in this Court should be governed by it.

II

Of the cases presently under discussion, only *Williams* involves direct review of a nonfinal criminal judgment. The other two, *Elkanich* and *Mackey*, were brought here by persons in federal custody, seeking release through issuance of a writ of habeas corpus.[1] At the time their

[1] I realize, of course, that state prisoners are entitled to seek release via habeas corpus under 28 U. S. C. § 2241, while federal prisoners technically utilize what is denominated a motion to vacate judgment under 28 U. S. C. § 2255. However, our cases make these remedies virtually congruent and the purpose of substituting a motion to vacate for the traditional habeas action in the federal system was simply to alter one minor jurisdictional basis for the writ. See *United States* v. *Hayman*, 342 U. S. 205 (1952). As I do not propose to make any distinction, for retroactivity purposes,

convictions became final, there was no constitutional error in the conviction of either. Since that time subsequent decisions of this Court have formulated new constitutional rules that invalidate the procedures like those involved in their trials.

While, as I have just stated, I think it clear what law should be applied to nonfinal convictions here on direct review, the choice of law problem as it applies to cases here on habeas seems to me a much more difficult one. However, that choice, in my view, is also one that can be responsibly made only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available.

As I first pointed out in my dissent in *Desist*, 394 U. S., at 260–261, this Court's function in reviewing a decision allowing or disallowing a writ of habeas corpus is, and always has been, significantly different from our role in reviewing on direct appeal the validity of nonfinal criminal convictions. While the entire theoretical underpinnings of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law, including federal constitutional issues, fairly implicated by the trial process below and properly presented on appeal, federal courts have never had a similar obligation on habeas corpus.

Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that

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between state and federal prisoners seeking collateral relief, I shall refer throughout this opinion to both procedures as the writ of habeas corpus, and cases before us involving such judgments as cases here on collateral review.

have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed. Indeed, this interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from the cognizance of courts administering this collateral remedy. This has always been the case with collateral attacks on final civil judgments.[2] More immediately relevant here is the fact that

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[2] For example, we have more than once in recent years had before us a libel case in which a party was allegedly libeled and brought suit for redress prior to this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), where we announced a new constitutional rule governing liability in libel suits brought by public officials. Yet no one connected with such cases has ever been heard to do so much as hint that the *New York Times* rule is not applicable because the conduct complained of occurred or the suit was brought before this new rule was promulgated. See, *e. g.*, *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966). Cf. *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281–283 (1969).

Conversely, is it not perfectly clear that, had such a party procured and collected a final damage award prior to *New York Times*, the defendant could not have urged that the case be reopened solely because of our subsequent decision in that case? Absent proof of fraud or want of jurisdiction in the trial court that judgment would be *res judicata* and entitled to full faith and credit throughout the land.

This is not to suggest that civil and criminal collateral attack ought necessarily to be precisely congruent in the federal system. But certainly it illustrates that the law has always perceived collateral attack as a problem quite different from direct appeal.

prior to *Brown* v. *Allen*, 344 U. S. 443 (1953), federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original criminal proceeding, see my dissent in *Fay* v. *Noia*, 372 U. S. 391, 449–463 (1963), unless the petitioner attacked the constitutionality of the federal, *Ex parte Siebold*, 100 U. S. 371 (1880), or state, *Crowley* v. *Christensen*, 137 U. S. 86 (1890), statute under which he had been convicted. See generally Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463 (1963); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1040, 1042–1062 (1970).

Thus, prior to *Brown* v. *Allen*, it must have been crystal clear that the "retroactivity" of a new constitutional rule was a function of the scope and purposes of the habeas corpus writ. Absent unusual circumstances, a new rule was not cognizable on habeas simply because of the limited scope of the writ. While the extent of inquiry into alleged constitutional error on habeas has been drastically expanded in the past 20 years, the retroactivity problem remains analytically constant. In my view, the issues respectively presented by the two cases I treat here that arise on collateral review (*Elkanich* and *Mackey*)—whether the new rules of the *Chimel* case and the *Marchetti* and *Grosso* cases should be applied "retroactively"—must be considered as none other than a problem as to the scope of the habeas writ. We can properly decline to apply the *Chimel* rule, or the principles of *Marchetti* and *Grosso*, to the present cases only if that is consistent with the reasons for the provision, in our federal legal system, of a habeas corpus proceeding to test the validity of an individual's official confinement.

Thus I am led to make some inquiry into the purposes of habeas. At the outset I must note that this faces

me with difficult problems. I have consistently protested a long course of habeas decisions in this Court which, I still believe, constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system. See, *e. g.*, *Fay* v. *Noia*, 372 U. S. 391, 448 (1963); *Sanders* v. *United States*, 373 U. S. 1, 23 (1963); *Kaufman* v. *United States*, 394 U. S. 217, 242 (1969); *Townsend* v. *Sain*, 372 U. S. 293, 325 (1963) (STEWART, J., dissenting). If I felt free to decide the present cases consistently with my own views of the legitimate role of the Great Writ, I should have little difficulty. But as my views on this score have not commended themselves to most of my Brethren, I feel obliged to approach these two collateral cases within the framework of current habeas corpus doctrine. This is not an easy exercise, for present habeas corpus decisions provide little assistance in fathoming the underlying understanding of habeas corpus upon which these decisions have been premised. The short of the matter is that this Court has in recent times yet to produce any considered, coherent statement of the general purposes of habeas. In considering the problem of "retroactivity" on direct review, it is possible to work from a general classic theory of judicial review, but while the specific uses of the habeas writ have greatly multiplied, the earlier perception of its general metes and bounds has been swallowed up and gone unreplaced. About the only way to proceed is to work from the bottom up, ascertaining first which issues are cognizable on habeas, and which are not, and thereafter inferring what must be thought to be the nature of the writ.

I start with the proposition that habeas lies to inquire into every constitutional defect in any criminal trial, where the petitioner remains "in custody" because of the judgment in that trial, unless the error committed was

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knowingly and deliberately waived or constitutes mere harmless error. That seems to be the implicit premise of *Brown* v. *Allen, supra,* and the clear purport of *Kaufman* v. *United States, supra.* This is not to say, however, that the function of habeas corpus is to provide a federal forum for determining whether any individual is presently "in custody in violation of the constitution . . . of the United States," 28 U. S. C. § 2254 (1964 ed., Supp. V), in the sense that the basis for his incarceration would, under the law existing at the time a petition is filed or adjudicated, as distinguished from the law that was applicable at the time his conviction became final, be held free of constitutional error. Cf. Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 Va. L. Rev. 1115 (1964).

While it has been generally, although not universally, assumed that habeas courts should apply current constitutional law to habeas petitioners before them,[3] I do not believe this is or should be the correct view. First, no such proposition has ever been squarely considered and embraced by this Court, at least since the recent proliferation of criminal defendants' protected constitutional

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[3] Professor Mishkin has pointed out that "prior to *Linkletter,* the criteria applied in federal habeas corpus proceedings were uniformly the constitutional standards in effect at the time of those proceedings, regardless of when the conviction was actually entered." Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 78 (1965). See also, *e. g.,* Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1040, 1151, 1153 (1970); *Sanders* v. *United States,* 373 U. S. 1, 17 (1963); *Miller* v. *Gladden,* 341 F. 2d 972, 975 (CA9 1965).

For a counter-example, see *Milton* v. *Wainwright,* 306 F. Supp. 929 (SD Fla. 1969), where a district judge adjudicating a habeas petition declined to consider any of this Court's decisions relating to involuntary confessions that postdated 1958, the time at which the petitioner's murder conviction became final. See also n. 4, *infra.*

rights and the concomitant expansion of the writ.[4] Moreover, applying current constitutional standards to convictions finalized while different views were ascendant appears unnecessary to achieve the ends sought by *Brown* and *Kaufman*. The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark. See *Kaufman* v. *United States*, 394 U. S., at 226. However, the opinion in *Kaufman* itself concedes that there is no need to apply new constitutional rules on habeas to serve the interests promoted by that decision. 394 U. S., at 229. Further, as I explain in the margin below,[5] Congress, in at least one significant

[4] Arguably, *Reck* v. *Pate*, 367 U. S. 433 (1961), tacitly holds that habeas petitions must be judged in accordance with current law. The Court there directed the issuance of the writ on the ground that petitioner's conviction, which became final in 1936, had been procured by the introduction into evidence of an illegally obtained confession, relying heavily on cases decided by this Court subsequent to 1936. The District Court, in denying relief, had clearly held that the admissibility of his confession was to be judged by standards prevailing in 1936. *United States ex rel. Reck* v. *Ragen*, 172 F. Supp. 734, 745–746 (ND Ill. 1959). However, this choice of law problem was not expressly adverted to and the case arose before this Court produced the recent enlargement of new constitutional rules of criminal procedure.

[5] In 1966, Congress amended the habeas statutes to deal with this Court's discussion in *Sanders* v. *United States*, 373 U. S. 1 (1963), of *res judicata* principles as they apply to habeas corpus. One subsection of that new statute provides:

"In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review . . . of the decision of such State court, shall be conclusive as to all issues of fact or law . . . actually adjudicated by the Supreme Court therein, unless the applicant . . . shall plead and the court shall find the existence of *a material and controlling*

regard, seems plainly to have disapproved the notion that supervening constitutional interpretation ought to apply on habeas involving state convictions.

Clearly, it is at least fair to regard this issue as not yet settled by this Court. Consequently, I go on to inquire how it ought to be resolved. For me, with a few exceptions, the relevant competing policies properly balance out to the conclusion that, given the current broad scope of constitutional issues cognizable on habeas,

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fact which did not appear in the record of the proceeding in the Supreme Court [and could not have been put in by exercising due diligence]." 28 U. S. C. § 2244 (c) (1964 ed., Supp. V) (emphasis added).

Unless one is to read "fact" as including a change in the law, it would seem that Congress has provided in these circumstances for finality as to legal determinations. That "fact" is properly read narrowly seems the better view in light of subsections (a) and (b) which permit a subsequent habeas petition (where there was no Supreme Court review) if it presents a "new ground" or "a factual or other ground not adjudicated on the [prior] hearing." Although the legislative history is extremely sparse, it fully supports this reading. Both the House and Senate committee reports accompanying these amendments stated that the purpose of the reformulation of § 2244 was to introduce a greater measure of finality into the law by providing for a qualified application of the *res judicata* concept. See H. R. Rep. No. 1892, 89th Cong., 2d Sess., 3, 8 (1966); S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). There was no relevant floor debate on these amendments.

Nor do I think the converse inference can properly be drawn that, if Congress provided legal finality for those prisoners whose convictions had been affirmed by us, it intentionally determined that other convicts should be able to avail themselves of all new constitutional rules on habeas. The language of subsections (a) and (b) certainly does not compel such a conclusion. The congressional committee reports neither state nor fairly imply that these amendments were designed to achieve the maximum feasible or desirable finality in habeas proceedings. Most important, it is difficult to imagine what would be the rationale for such a distinction merely between those who have and have not, at some time in the remote past, had full review of their cases in this Court.

it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation.

I do not mean to neglect the force of countervailing contentions. Assuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional notions, it may be hoped, ring more "correct" or "just" than those they discarded.

In my view, however, these interests are too easily overstated. Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously subject to change. And it has been the law, presumably for at least as long as anyone currently in jail has been incarcerated, that procedures utilized to convict them must have been fundamentally fair, that is, in accordance with the command of the Fourteenth Amendment that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." *Twining* v. *New Jersey*, 211 U. S. 78 (1908). Moreover, it is too easy to suggest that constitutional updating is necessary in order to assure that the system arrives only at "correct" results. By hypothesis, a final conviction, state or federal, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it. To argue that a conclusion reached by one of these "inferior" courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional com-

mand carries more emotional than analytic force. No one has put this point better than Mr. Justice Jackson, in his concurring opinion in *Brown* v. *Allen*, 344 U. S., at 540:

> "[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

More importantly, there are operative competing policies in this area which I regard as substantial. It is, I believe, a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view. See, *e. g.*, *Fay* v. *Noia*, 372 U. S., at 445 (Clark, J., dissenting); *Spencer* v. *Texas*, 385 U. S. 554, 583 (1967) (Warren, C. J., concurring and dissenting). See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146–151 (1970). As I have stated before, "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S., at 24–25 (HARLAN, J., dissenting). At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to

be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. See Friendly, *supra,* at 148–149. This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first. See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 (1964).

In sum, while the case for continually inquiring into the current constitutional validity of criminal convictions

on collateral attack is not an insubstantial one, it is by no means overwhelming. Most interests such a doctrine would serve will be adequately protected by the current rule that all constitutional errors not waived or harmless are correctible on habeas and by defining such errors according to the law in effect when a conviction became final. Those interests not served by this intermediate position are, in my view, largely overridden by the interests in finality.

Although not necessary to the resolution of either of the two collateral cases now here, for sake of completeness I venture to add that I would make two exceptions to this general principle. First, the above discussion is written only with new "procedural due process" rules in mind, that is, those applications of the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior.[6] New "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,[7] must, in my view, be placed on a different footing. As I noted above, the writ has historically

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[6] I have in mind, of course, decisions such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Chimel* v. *California*, 395 U. S. 752 (1969).

[7] For example, *Street* v. *New York*, 394 U. S. 576 (1969); *Stanley* v. *Georgia*, 394 U. S. 557 (1969); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Loving* v. *Virginia*, 388 U. S. 1 (1967). Some rules may have both procedural and substantive ramifications, as I have used those terms here. See, *e. g.*, my discussion, in Part IV-C of this opinion of the divergent ways *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), bear on the problems raised by today's Fifth Amendment cases.

been available for attacking convictions on such grounds.[8] This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above. Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus. See generally Part II of my opinion for the Court in *United States* v. *United States Coin & Currency*, *post*, p. 722.

Secondly, I think the writ ought always to lie for claims of nonobservance of those procedures that, as so aptly described by Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are "implicit in the concept of ordered liberty." Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

[8] See, *e. g.*, *Ex parte Siebold*, 100 U. S. 371 (1880); *Crowley* v. *Christensen*, 137 U. S. 86 (1890); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). And see cases collected in Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 n. 30 (1964), and the discussion therein of the finality implications such instances present.

For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime. See my separate opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963), where I concurred in conferring this right on a state prisoner, seeking state habeas corpus, on the grounds that this "new" rule was mandated by *Palko*. Hence, I would continue to apply *Gideon* itself on habeas, even to convictions made final before that decision was rendered. Other possible exceptions to the finality rule I would leave to be worked out in the context of actual cases brought before us that raise the issue.

Subsequent reflection upon what I wrote in *Desist*, where I undertook to expose in a preliminary way some of the considerations I thought ought to govern the problem of deciding which, if any, new constitutional rules should be held cognizable in habeas proceedings, leads me to these additional observations. There I tentatively suggested we might apply those new rules that "significantly improve the pre-existing fact-finding procedures" mandated by the Federal Constitution. 394 U. S., at 262. Cf. Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 77–101 (1965). As indicated above, I am now persuaded that those new rules cognizable on habeas ought to be defined, not by the "truth-determining" test, but by the *Palko* test. My reasons are several. First, adherence to precedent, particularly *Kaufman* v. *United States*, must ineluctably lead one to the conclusion that it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged. Additionally, recent decisions of this Court, *e. g.*, *Coleman* v. *Alabama*, 399 U. S. 1 (1970), have revealed just how marginally effective are some new rules purportedly aimed at improving the fact-

finding process. I cannot believe that the interest in finality is always outweighed by the interests protected in cases like *Coleman*. Cf. *Spencer* v. *Texas*, 385 U. S., at 583 (Warren, C. J., concurring and dissenting). I believe *Palko* more correctly marks the tipping point of finality interests, not only in terms of divining which new rules should apply on habeas, but also in its reminder that a particular rule may be more or less crucial to the fairness of a case depending on its own factual setting. Finally, I find inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values. For a perfect example, note the plurality's difficulty today in explaining, on that basis, retroactivity decisions such as *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967); and *DeStefano* v. *Woods*, 392 U. S. 631 (1968). *Williams* v. *United States*, *ante*, at 655–656, n. 7.

Secondly, in *Desist* I went to some lengths to point out the inevitable difficulties that will arise in attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." 394 U. S., at 263. See generally *id.*, at 263–269. I remain fully cognizant of these problems and realize they will produce some difficulties in administering the writ, but believe they would be greatly ameliorated by adequate recognition of the principle of finality in the operation of the criminal process.

III

I realize, of course, that this opinion, which is already unfortunately lengthy, has thus far not been directly responsive to the plurality opinions announced in these

cases. Essentially this is because I do not perceive the issues raised by these cases from the same perspective as my Brethren. Certain aspects of the other opinions announced today do, however, fairly call for a response both because they contain some small seeds of a challenge to what I have said above and because I think, with respect, that what is written today by some of those who would give virtually unlimited sweep to this "retroactivity" doctrine strikingly illuminates the faulty premises of the thinking in this entire field.

In the plurality opinions in *Williams* and *Elkanich*, and *Mackey* the only challenge I perceive to my views is the single assertion that my analysis is untenable because unsupported by precedent. *Williams* v. *United States*, *ante*, at 651–652. Truly, this is a remarkable claim. For *Linkletter* v. *Walker*, *supra*, the wellspring of the current retroactivity doctrine, took as its point of departure the very distinction between direct review and collateral attack which I have argued is crucial to any analysis in this field, a distinction which the Court now firmly discards.

Further, as the dissenting opinion in *United States* v. *United States Coin & Currency*, *post*, at 735, points out, in an analogous situation, the legislative repeal of a criminal statute, "the judge-made rule was that those whose convictions had been finally affirmed when repeal took place received no benefit from the new rule; but repeal of a statute abated pending prosecutions and required reversal of convictions still on appeal when the law was changed." In other words, the precise distinction I have urged between direct review and collateral attack, based not on the nature of the act of changing the law or of the new law thus pronounced but, instead, on the nature of the adjudicatory context in which the claim of legal error was presented has consistently

been the model for the judicial process. Indeed, it would seem that the only precedential support for the position that prevails today is that conflicting and confusing flurry of "retroactivity" opinions that commenced less than five years ago with *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

Other aspects of the dissent in *Coin & Currency*, *supra*, might, it seems to me, be construed as a further challenge to the views I have expressed here since that opinion is subscribed to by a majority of those members of the Court who have determined that, for purposes of deciding whether new search and seizure rules apply to subsequent cases arising in federal courts, the process invoked by the litigants is irrelevant. In any event, I find the implications of the analysis underlying that dissent startling. For example, that Congress currently provides that statutory repeal shall not abate pending prosecutions or require reversal of nonfinal convictions seems to me a singularly unhelpful bit of information. We sit as a court of law, not a council of revision. Our powers of judicial review are judicial, not legislative, in nature. The assertion that this evidence is relevant data for resolving the problems at hand serves at best only to make explicit that which I have attempted to demonstrate in Part I of this opinion—that the retroactivity analysis currently ascendant in this Court proceeds on the false and unacceptable premise that constitutional interpretation is not purely a judicial, but, rather, something akin to a legislative, process. If, in fact, that premise is true we ought not to be writing retroactivity opinions but instead relinquishing some of our powers of judicial review.

The dissenting opinion attempts to palliate its invocation of the legislative process by alternately suggesting that the typical statutory rule is, because widespread, part

of our fabric of "positive law" and the issue, therefore, is whether this Court should carry this policy over to the realm of constitutional interpretation. Three cases are cited that allegedly reveal we are not foreclosed from taking this course. The short answer to all this remains the same: the distinction between judicial and legislative power is equally woven deeply into the fabric of our positive law. So, too, is the notion that this Court definitively interprets the Constitution only because its role as a court of law requires it to do so. It is not surprising, then, to discover upon closer analysis that the cited cases do not bear the heavy weight placed on them. *Gelpcke* v. *City of Dubuque*, 1 Wall. 175 (1864), holds only that *state* courts may be *compelled* in some situations by particular provisions of *the Federal Constitution* to apply certain new rules prospectively only. No such claim has ever been made about these new constitutional rules of criminal procedure. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only. Is it not sufficient answer to the dissenters' final assertion of precedential support to point out that *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), was a collateral attack on a civil judgment already otherwise final and entitled to *res judicata* effect? And, further, that it was written by the same Chief Justice, Hughes, who had held six years earlier in *United States* v. *Chambers*, 291 U. S. 217 (1934), that repeal of the Eighteenth Amendment abated all prosecutions begun, and required reversal on direct review of all convictions obtained, under statutes dependent for their constitutionality on the repealed amendment, yet did not affect final convictions so obtained?

IV

Because my comprehension of the relevant issues diverges so substantially from that of the Court it is necessary for me to discuss separately my view as to the proper disposition of each of these three cases.

A

Williams v. *United States* (direct review). As this case is here on direct review, I would apply to its resolution the rule enunciated in *Chimel* v. *California*, 395 U. S. 752. The plurality correctly describes the salient facts in this case at n. 2 of its opinion, *ante*, at 650–651, and I agree they plainly reveal a violation of *Chimel*. Indeed, the Ninth Circuit panel below, although it held *Chimel* nonretroactive, explicitly found the search here involved inconsistent with the dictates of *Chimel*. 418 F. 2d 159, 161 (CA9 1969). Consequently, I would reverse the judgment below and remand with instructions to vacate the judgment of conviction.

B

Elkanich v. *United States* (collateral review). I agree, but for wholly different reasons, with the Court's view, expressed in n. 2 of its opinion, *ante*, at 651, that we need not evaluate the search of Elkanich's apartment in light of the precepts of *Chimel*. His conviction became final five years prior to *Chimel*'s promulgation, and prevailing law at that time certainly validated the search here involved. See *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), and *Harris* v. *United States*, 331 U. S. 145 (1947). An appraisal of the facts surrounding this search leads me quite easily to conclude that the procedures used in obtaining this conviction were not so fundamentally devoid of the necessary elements of pro-

cedural due process as to require upsetting this conviction in spite of the fact that it was perfectly lawful when made final. The agents here clearly had probable cause to arrest petitioner, were not undertaking a fishing expedition for any evidence they might find but, rather, were looking for specific items that they had reason to believe might be concealed in various places around the premises and, indeed, generally limited their search to areas indicated by petitioner. I would affirm the judgment below.

C

Mackey v. *United States* (collateral review). Petitioner in this case seeks relief from confinement by way of habeas. At his trial for evading payment of income taxes, part of the Government's case in chief consisted of the introduction of 60 wagering excise tax returns. At the time his conviction became final in 1965, the introduction of these statements would have been permissible under the authority of *United States* v. *Kahriger*, 345 U. S. 22 (1953). I find it unnecessary to inquire whether it inevitably follows from the new rule enunciated in *Marchetti* and *Grosso* that such a procedure would today be held an unacceptable abridgment of petitioner's Fifth Amendment right to be free of compulsory self-incrimination. For, even assuming the latter cases, if applicable, would produce a different result, I cannot conclude that this change in the law would be sufficient to entitle petitioner to the issuance of a writ of habeas corpus.

Mackey is not asserting that the conduct for which he is being punished, evading payment of his federal income taxes, has been held to be constitutionally immune from punishment. In this regard, Mackey's claim differs from that raised by the respondent in *Coin & Currency*, also decided today, where *Marchetti* and *Grosso* do operate to render Congress powerless to punish

the conduct there at issue. Instead, Mackey's claim is that the procedures utilized in procuring his conviction were vitiated by the *Marchetti* and *Grosso* decisions. Since matters of procedure rather than substance are involved, see Part II of this opinion, I would apply to the resolution of this habeas petition the law in effect at the time Mackey's conviction became final, absent a showing that the procedures employed were fundamentally unfair. While *Kahriger* did indeed, in my judgment, rest upon an "excessively narrow" view of the scope of the privilege against self-incrimination, I cannot say that hindsight reveals that judgment to have been so grossly erroneous as to amount to the perpetration of an inexcusable inequity against Mackey in these circumstances. Despite our rejection of it as a matter of Fifth Amendment policy, the prior justification of the Government's activity in this area—that persons affected could avoid incrimination by ceasing to engage in illegal activities—is not without some force.

Although the question is, for me, not free of difficulty, I would affirm the judgment below for the reasons stated above.

V

In conclusion, the Court in deciding these cases seems largely to have forgotten the limitations that accompany its functions as a court of law. For the retroactivity doctrine announced today bespeaks more considerations of policy than of legal principle. Treating direct and collateral review as if they were of one piece seems to me faulty analysis, ignoring, as it does, the jurisprudential considerations that differentiate the two kinds of adjudicatory functions. As a court of law we have no right on direct review to treat one case differently from another with respect to constitutional provisions applicable to both. As regards cases coming here on collateral review, the problem of retroactivity is in truth

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none other than one of resettling the limits of the reach of the Great Writ, which under the recent decisions of this Court has been given almost boundless sweep.[9] Until the Court is prepared to do this I can see no really satisfactory solution to the retroactivity problem. Meanwhile, I very much regret to see the existing free-wheeling approach to that problem now rewritten into the jurisprudence of this Court.

I would affirm the judgments in Nos. 36 and 82 and reverse the judgment in No. 81 upon the premises discussed in this opinion.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Three years ago we held that the federal wagering tax statutes, 26 U. S. C. § 4401 *et seq.*, subjected those to whom they applied to such a real and substantial danger of self-incrimination that those statutes could "not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." *Marchetti* v. *United States*, 390 U. S. 39, 42 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion, I concur in the judgment of the Court.[1]

[9] For example, though correct in its result, I am now of the view that *Linkletter* would have been better decided had it simply held that federal habeas corpus does not lie for claimed errors in the introduction of illegally seized evidence.

[1] This view of the case makes it unnecessary for me to decide whether petitioner's conviction should be examined without regard

I

The relevant facts may be briefly stated. As required by statute, petitioner from 1956 through 1960 filed monthly wagering excise tax returns showing his name, address, and the gross amount of wagers accepted by him during the month in question.[2] He was subsequently indicted for willfully attempting to evade payment of his income taxes for those years. 26 U. S. C. § 7201. At trial, the Government used the wagering tax returns to show that the gross amount of wagers reported, less the expenses of petitioner's business as reported on his annual income tax returns, was greater than the profits from gambling reported on those same annual returns. The Court of Appeals affirmed over petitioner's claim that the returns were inflammatory, prejudicial, and irrelevant. 345 F. 2d 499 (CA7 1965). After our decisions in *Marchetti* v. *United States, supra,* and *Grosso* v. *United States, supra,* petitioner filed an application for postconviction relief on the ground that use of the wagering tax returns was barred by the Fifth Amendment. The application was denied by the District Court in an unreported opinion, and the denial was affirmed by the Court of Appeals. 411 F. 2d 504 (CA7 1969).

II

At first glance, petitioner's argument appears compellingly simple. Since the information required of him under the federal wagering tax statutes presented a real and substantial danger of subjecting him to criminal prosecution for his gambling activities, the Government

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to the standards embodied in *Marchetti* and *Grosso*. The balance of this opinion is written on the assumption that *Marchetti* and *Grosso* are applicable.

[2] See 26 U. S. C. § 6011 (a); Treas. Reg. § 44.6011 (a)–1 (a), 26 CFR § 44.6011 (a)–1 (a).

lacked the power to compel the information absent a waiver of his Fifth Amendment privilege unless it provided the necessary immunity from prosecution. *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Heike* v. *United States*, 227 U. S. 131, 143–144 (1913); *Counselman* v. *Hitchcock*, 142 U. S. 547, 584–586 (1892). Since petitioner filed the wagering tax returns under threat of criminal prosecution for failure to do so, 26 U. S. C. § 7203, and since he never knowingly waived his Fifth Amendment privilege, see *Grosso* v. *United States*, *supra*, at 70–71, he is entitled to the immunity required by the Fifth Amendment. *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954). Therefore, petitioner argues, the Government was foreclosed from using the information provided by him on the wagering tax returns against him in a criminal prosecution for evasion of the income tax.

But in *Marchetti* and *Grosso*, we dealt with the question whether, in light of possible uses of testimonial evidence sought to be compelled over a claim of privilege, the Fifth Amendment allows the individual concerned to withhold the evidence without penalty. In the present case, however, we deal with the scope of immunity required when the privilege is claimed and the evidence is nevertheless compelled. This distinction, in my view critical, is overlooked by petitioner. Where testimony has been refused, adjudication of necessity must take place in something of a vacuum. Although an individual may not "draw a conjurer's circle around the whole matter" by refusing to provide any explanation why the information sought might be incriminating, *United States* v. *Sullivan*, 274 U. S. 259, 264 (1927), he need not provide the incriminating evidence in order to demonstrate that the privilege was validly invoked, *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). In such circumstance, sanctions may be applied for re-

fusal to testify only if it is " '*perfectly clear*, from a careful consideration of all the circumstances in the case . . . that the answer[s] *cannot possibly* have [a] tendency' to incriminate." *Id.*, at 488, quoting *Temple* v. *Commonwealth*, 75 Va. 892, 898 (1881) (emphasis in original).

But where the individual has succumbed to compulsion and provided the information sought, finer analytical tools may be employed. "A factual record showing, for example, the substance of the individual's compelled testimony, the way that testimony was subsequently used by the prosecutor, and the crime for which the individual was ultimately prosecuted, provides important considerations to anchor and inform the constitutional judgment." *Piccirillo* v. *New York*, 400 U. S. 548, 558 (1971) (BRENNAN, J., dissenting). Thus, even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements. *United States* v. *Knox*, 396 U. S. 77, 80–83 (1969).

The flaw in petitioner's argument lies in its misunderstanding of *Marchetti* and *Grosso* as applied to a situation where testimonial evidence has been compelled over a claim of privilege. For we did not, in those cases, cast any doubt upon the power of the United States to impose taxes on unlawful, as well as on lawful activities. 390 U. S., at 44; see *United States* v. *Sullivan*, 274 U. S., at 263. Nor did we suggest that the Fifth Amendment would make it impossible for Congress to construct an enforceable statutory scheme for reporting by individuals of their illicit gains. See 390 U. S., at 72 (BRENNAN, J., concurring). Rather, we noted that "[t]he laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities," and that even Nevada imposed

"criminal penalties upon lotteries and certain other wagering activities taxable under [the federal] statutes." *Id.*, at 44–46. We noted that federal statutes prohibit the use of the mails and of interstate commerce for many activities ancillary to wagering.[3] *Id.*, at 44. On that basis we concluded that "throughout the United States, wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.' *Albertson* v. *SACB*, 382 U. S. 70, 79." *Marchetti*, 390 U. S., at 47. Accordingly, registration and payment of the occupational tax, or the filing of a wagering excise tax return that the Government required as a prerequisite to payment of the excise tax,[4] would subject the individual concerned to " 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." *Id.*, at 48; *Grosso*, 390 U. S., at 64–67. Since we found the "required records" doctrine of *Shapiro* v. *United States*, 335 U. S. 1 (1948), inapplicable to the statutory requirement that a gambler admit his present or future involvement in gambling activity, *Marchetti*, 390 U. S., at 55–57; *Grosso*, 390 U. S., at 67–69, we held that the privilege against self-incrimination was available to the petitioners as a defense to prosecution for failure to register for, report, or pay the federal wagering taxes.[5]

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[3] See 18 U. S. C. § 1084 (interstate transmission of wagering information), §§ 1301–1304 (conduct of lotteries by mails or broadcasting), § 1952 (interstate travel in aid of, *inter alia*, gambling), § 1953 (interstate transportation of wagering paraphernalia).

[4] We were informed by the United States in *Grosso* that the wagering excise tax would not be accepted unless accompanied by the required return. 390 U. S., at 65.

[5] In addition, we declined in both *Marchetti* and *Grosso* the Government's invitation to salvage the statutory scheme by imposing use restrictions on the information required. *Marchetti*, 390 U. S., at 58–60; *Grosso*, 390 U. S., at 69. The relevance of this to the issue before us is discussed *infra*, at 711–713. For the moment

Had the present case arisen in the context of a federal investigation designed simply to uncover evidence of criminal activity, we would need to go no further.[6] In such a situation, petitioner would be entitled to "absolute immunity . . . from prosecution [under federal laws] for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S., at 562 (BRENNAN, J., dissenting); *Counselman* v. *Hitchcock*, 142 U. S., at 584–586. But although we recognized in *Marchetti* that "Congress intended information obtained as a consequence of registration and payment of the [gambling] occupational tax to be provided to interested prosecuting authorities," *Marchetti*, 390 U. S., at 58–59,[7] we nevertheless concluded that the "United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers." *Id.*, at 57; see *United States* v. *Calamaro*, 354 U. S. 351, 358 (1957).

This dual purpose is significant here. For while the Government may not undertake the prosecution of crime by inquiring of individuals what criminal acts they have lately planned or committed, it may surround a taxing or regulatory scheme with reporting requirements de-

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it is sufficient to note that even the imposition of use restrictions could not have saved the convictions at issue in those cases, for the petitioners obviously had no way of knowing, when they failed to register and file the required forms, that use restrictions might be imposed. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79–80 (1964); *Reina* v. *United States*, 364 U. S. 507, 514–515 (1960).

[6] See n. 1, *supra*.

[7] In *Grosso*, we remarked that "although there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax," and that the Revenue Service in fact disseminated such information to "interested prosecuting authorities." *Grosso*, 390 U. S., at 66.

signed to insure compliance with the scheme. See *Marchetti*, 390 U. S., at 44, 60; *Grosso*, 390 U. S., at 72–74 (concurring opinion). In the latter situation, the privilege may not be claimed if the danger of incrimination is only that the information required may show a violation of the taxing or regulatory scheme. Thus in *Shapiro* v. *United States*, 335 U. S. 1 (1948), we upheld a conviction based upon records of sales provided under compulsion of a regulation under the Emergency Price Control Act, 56 Stat. 23. The privilege had been claimed on the basis that the records would (as they did) provide evidence of a violation of the Act. We rejected the claim, reasoning that the Government has power to compel " 'suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " *Id.*, at 33.[8] And in *United States* v. *Sullivan*, 274 U. S. 259 (1927), we rejected a claim that the privilege against self-incrimination allowed an individual whose income was earned in crime to file no form of income tax return whatsoever. Although dubious, we noted the possibility that the privilege could be claimed to excuse reporting the amount of income earned because that alone would disclose the criminal activities that had produced the income. *Id.*, at 263–264. But neither in *Sullivan* nor in any other of our cases is there the slightest suggestion that an individual may refuse to disclose the income he has earned solely because such disclosure will indicate a failure to pay the taxes imposed on that income.

Of course, the Government may not insulate inquiries designed to produce incriminating information merely by

[8] The regulation upheld in *Shapiro* required only the keeping of records, and not their reporting; the information there was compelled pursuant to an administrative subpoena. But as we noted in *Marchetti*, this situation is constitutionally indistinguishable from a simple reporting requirement. 390 U. S., at 56 n. 14.

labeling the inquiry a necessary incident of a regulatory scheme. Where the essence of a statutory scheme is to forbid a given class of activities, it may not be enforced by requiring individuals to report their violations. See *Marchetti, supra; Haynes* v. *United States,* 390 U. S. 85 (1968); *Albertson* v. *SACB,* 382 U. S. 70 (1965). But where the statutory scheme is not designed to forbid certain acts, but only to require that they be done in a certain way, the Government may enforce its requirements by a compulsory scheme of reporting, directed at all who engage in those activities, and not on its face designed simply to elicit incriminating information. *Shapiro* v. *United States, supra;* see *Albertson* v. *SACB, supra,* at 77–80.

Viewed in this light, then, *Marchetti* and *Grosso* are the outgrowth of two principles inapplicable to the problem at hand. The first is that when a given class of activities is, in the main, made criminal by either state or federal law, an individual may not be compelled to disclose whether he engages in activities within the class unless his disclosure is compensated by the requisite grant of immunity.[9] *Marchetti, supra; Haynes* v. *United States, supra; Albertson* v. *SACB, supra.* The second is that such individuals may likewise not be compelled, absent sufficient immunity, to disclose the details of their activities within such a suspect class: for if the mere admission of engaging in any of a class of activities is sufficiently likely to lead to criminal prosecution that the privilege against self-incrimination may be invoked,

[9] Since the statutory scheme in *Marchetti* and *Grosso* provided no immunity whatsoever, and since those cases arose in the context of an attempt by the Government to punish individuals for failure to disclose the information requested, we had no occasion there to determine the precise scope of the immunity that would be required to displace the privilege.

admission of the details of these activities is *a fortiori* likely to lead to incrimination. *Grosso, supra.*

Neither of these principles, however, controls the case at hand. The relevant class of activities "permeated with criminal statutes," *Albertson* v. *SACB*, 382 U. S., at 79, is the class of activities related to gambling. But this case does not involve a prosecution for gambling or related activities. It involves a prosecution for income tax evasion, by use of information compelled pursuant to a scheme requiring all those who engage in the business of accepting wagers[10] to report their income twice. For the reasons discussed above, the Government may validly enforce the tax laws by a scheme of required reports, directed at all persons engaging in certain types of activity, and requiring them to report the amount of their income so that the Government may insure that the requisite taxes have been paid. If such a reporting requirement raises a substantial danger of incrimination under state or federal statutes making criminal the activity that is being taxed, an individual may, of course, assert the privilege against self-incrimination and refuse to disclose the information sought. We so held in *Marchetti* and *Grosso*. And if the information has been compelled over a claim of privilege, application of those cases requires that the individual be protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity, and to complete immunity from prosecution under federal statutes of like kind. *Piccirillo* v. *New York*, 400 U. S., at 561–574 (BRENNAN, J., dissenting); *Adams* v. *Maryland*, 347 U. S., at 181; *Counselman* v. *Hitchcock*, 142 U. S., at 584–586; cf. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79, and n. 18 (1964). He is, in short, entitled to the protection

[10] The few exceptions to this requirement are noted in *Marchetti*, 390 U. S., at 42.

required by the Fifth Amendment. But here the Government was entitled to demand the information that petitioner supplied—his gross income from wagering—in order to enforce the tax laws. Petitioner was entitled to claim the privilege only because of the possibility of prosecution under state or federal gambling laws. No such prosecution is involved here. "Once the reason for the privilege ceases, the privilege ceases." *Ullmann* v. *United States*, 350 U. S. 422, 439 (1956). Since the United States was entitled to demand the information at issue here for the purpose to which it was eventually put, the danger that petitioner's disclosures might also have been impermissibly used does not prevent their present, legitimate use even though the danger of impermissible use would justify refusal to provide the information at all.[11]

III

Finally, our decisions in both *Marchetti* and *Grosso* not to attempt to salvage the statutory scheme by imposing

[11] The filing of a wagering tax return (or registration as a prospective gambler) necessarily involves an admission that one has engaged in, or intends to engage in gambling. Since gambling and related activities are very likely to be criminal under state or federal law, the Government lacks power to compel such an admission absent the requisite grant of immunity. This was the question involved in *Marchetti* and *Grosso*. But what is relevant to the present case is not whether petitioner was involved in criminal activity, but whether he paid the taxes imposed on his income. I have indicated above why I believe that the Government may enforce an otherwise unobjectionable scheme designed to insure that individuals report the amount of their income in order to enforce the tax laws. It therefore follows that the registration and reporting requirements of the federal wagering tax statutes could properly be enforced under a statute granting those who complied with the requirements immunity from prosecution under federal statutes that outlaw gambling and related activities, and protection against the use of information contained in the returns in aid of prosecution under state or federal laws making such activities criminal.

use restrictions do not require that, once evidence has actually been compelled, we refuse to protect a valid governmental interest by restricting use of that evidence any more than is required by the Fifth Amendment. For although we recognized in *Marchetti* that "the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes," 390 U. S., at 59, the primary basis for our refusal to impose such restrictions was that "the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling." *Ibid.*[12] Since a balance between effective state enforcement of gambling laws and the interests of the federal treasury was one to be struck by Congress, and not this Court, we declined to impose the proposed restrictions. *Id.*, at 59–60. And in *Grosso*, we merely noted that it would be "inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon 'an integral part' of the same system." 390 U. S., at 69. Once again, however, different considerations apply when the question is not whether information may be compelled but rather to what uses compelled information may be put. Once the return has

[12] That this was the primary basis for our refusal is evidenced by our recognition that the "United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers." 390 U. S., at 57. Absent the necessity for balancing state and federal interests, we would surely not have crippled the primary purpose of the statutes because a secondary purpose was necessarily disabled.

been filed, prosecution under state gambling laws can take place only if the State can demonstrate that its evidence is not tainted by information derived from the incriminatory aspects of the return. Since disclosure once made may never be completely undone, this burden must be borne by the State regardless of what additional restrictions are imposed upon use of the return. Accordingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed. Petitioner is therefore entitled to the immunity required by the Fifth Amendment, and to no more. Since I believe the Amendment is no bar to the use to which his wagering tax returns were put, I concur in the judgment of the Court.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I had assumed that all criminal and civil decisions involving constitutional defenses which go in favor of the defendant were necessarily retroactive. That is to say, the Constitution has from Chief Justice Jay's time been retroactive,* for there were no decisions on the points prior thereto. *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, exonerated defendants who, when they failed to file returns, were not by reason of *United States* v. *Kahriger*, 345 U. S. 22, entitled to a constitutional immunity. Why Marchetti and Grosso are entitled to relief and Mackey is not, is a mystery. It is said that Mackey's gambling return, "like physical evidence seized in violation of a new interpretation of the Fourth Amendment, is concededly relevant and probative even though obtained by

*See *Chisholm* v. *Georgia*, 2 Dall. 419.

the Government through means since defined by this Court as constitutionally objectionable." The same could be said of Marchetti and Grosso. Yet their convictions were reversed.

I could understand today's decision if *Marchetti* and *Grosso* had announced only a prospective rule applicable to all like defendants. But when the defendants in those cases are given the benefit of a new constitutional rule forged by the Court, it is not comprehensible, if justice rather than the fortuitous circumstances of the time of the trial is the standard, why all victims of the old unconstitutional rule should not be treated equally.

I can find nothing in the Constitution that authorizes some constitutional rules to be prospective and others to be retroactive. The majority often says the test is whether a new rule affects the integrity of the factfinding process, *Desist* v. *United States*, 394 U. S. 244. Yet even that test is not applied when the majority thinks that the impact of the new rule, if applied with due regard to the Equal Protection Clause, would be "devastating." *Tehan* v. *Shott*, 382 U. S. 406, 419. The Constitution grants this Court no such legislative powers.

My views have been expressed in *Linkletter* v. *Walker*, 381 U. S. 618, 640, and *Johnson* v. *New Jersey*, 384 U. S. 719, 736, and I adhere to them. I would continue to construe all constitutional safeguards "strictly."

Syllabus

UNITED STATES *v.* UNITED STATES COIN & CURRENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5. Argued February 25–26, 1969—Reargued October 20, 1970—Decided April 5, 1971

The United States brought this action for the forfeiture of money in the possession of one Angelini when he was arrested for failing to register as a gambler and to pay the gambling tax required by 26 U. S. C. §§ 4411, 4412, and 4901. Having found that the money had been used in violation of those laws, the District Court ordered forfeiture under 26 U. S. C. § 7302. After the Court of Appeals affirmed, the case was remanded for further consideration in the light of this Court's subsequent decisions in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, which held that gamblers had the Fifth Amendment right to remain silent despite the statutory requirement that they submit reports that could incriminate them. The Court of Appeals thereafter ordered the money's return, having concluded that Angelini could assert his Fifth Amendment privilege. The Government contends that (1) the *Marchetti-Grosso* rationale is inapplicable to § 7302 forfeiture proceedings because under that provision "any property intended for use in violating the . . . internal revenue laws" is subject to forfeiture regardless of the property owner's guilt, and (2) *Marchetti* and *Grosso* should not be given retroactive effect. *Held:*

1. The Fifth Amendment privilege may properly be invoked in this case since the forfeiture statutes, when viewed in their entirety, are intended to penalize only persons significantly involved in a criminal enterprise. Pp. 717–722.

2. The *Marchetti-Grosso* rule has retroactive effect in a forfeiture proceeding under § 7302. Pp. 722–724.

393 F. 2d 499, affirmed.

HARLAN, J., delivered the opinion of the Court, in which BLACK, DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BLACK, J., filed a concurring statement, *post*, p. 724. BRENNAN, J., filed a concurring opinion, *post*, p. 724. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined, *post*, p. 730.

Jerome M. Feit argued the cause for the United States on the reargument. *Philip A. Lacovara* argued the cause for the United States, *pro hac vice*, on the original argument. On the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Francis X. Beytagh, Jr., Beatrice Rosenberg*, and *Lawrence P. Cohen.*

Anna R. Lavin reargued the cause for respondent. With her on the briefs was *Edward J. Calihan, Jr.*

Charles Alan Wright, Marvin K. Collie, and *Harry M. Reasoner* filed a brief for Joseph P. Lucia as *amicus curiae* on the reargument.

MR. JUSTICE HARLAN delivered the opinion of the Court.

After Donald J. Angelini had been convicted of failing to register as a gambler and to pay the related gambling tax required by federal law, 26 U. S. C. §§ 4411, 4412, 4901, the United States instituted the forfeiture proceeding to obtain $8,674 which Angelini had in his possession at the time of his arrest. The District Court for the Northern District of Illinois found that the money was being used in a bookmaking operation in violation of these internal revenue laws and ordered forfeiture under 26 U. S. C. § 7302 which provides:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws . . . and no property rights shall exist in any such property. . . ."

When the Court of Appeals affirmed, we granted certiorari, *sub nom. Angelini* v. *United States*, 390 U. S. 204, and remanded the case for further consideration in the light of our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), which precluded the criminal conviction of gamblers who properly assert

their privilege against self-incrimination as a ground for their failure to comply with these aspects of the gambling tax law. A unanimous panel of the Court of Appeals concluded that Angelini might properly assert his Fifth Amendment privilege in this forfeiture proceeding and ordered the return of the seized money. 393 F. 2d 499 (1968). Since the Court of Appeals for the Sixth Circuit subsequently came to the opposite conclusion,[1] we granted the Government's petition for certiorari in the present case, 393 U. S. 949 (1968), in order to resolve the conflict. The case was first argued at the 1968 Term and reargued at the current Term. We now affirm the decision below.

I

The Government's principal argument turns upon an exceedingly narrow construction of our decisions in *Marchetti* and *Grosso*. In those cases, we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities. It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question. The statute commanded that gamblers submit special registration statements and tax returns that contained information which could well incriminate them in many circumstances. Because the risk of self-incrimination was substantial, we held that a Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms. Since it was only this method of tax collection which was subject to constitutional objection, we indicated that the Government remained free to collect taxes due under the statute so long as it

[1] *United States* v. *One 1965 Buick*, 392 F. 2d 672, rehearing denied, 397 F. 2d 782.

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did not attempt to punish the taxpayer for his failure to file the required documents.

The Government now relies heavily on the fact that *Marchetti* and *Grosso* only held that "a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax." [2] (Emphasis supplied.) It argues that just as it may collect taxes in a civil action, the Government may also initiate forfeiture proceedings—which are also formally civil in nature—without offending *Marchetti* and *Grosso*. But as *Boyd* v. *United States*, 116 U. S. 616, 634 (1886), makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes. (Emphasis supplied.) From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force. See also *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 700 (1965).

The Government does not seriously contend otherwise. Instead it places great emphasis on the peculiar nature of the proceedings authorized under § 7302. *Boyd*, we are told, was only concerned with forfeitures which are imposed "by reason of offences committed by" the owner. 116 U. S., at 634. In the present action, however, the Government contends that the guilt of the owner of the money is irrelevant. The forfeiture statute, it is noted, simply authorizes confiscation of "any property

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[2] *Grosso* v. *United States*, 390 U. S., at 70 n. 7; see also *Marchetti* v. *United States*, 390 U. S., at 41–42, 61.

intended for use in violating the provisions of the internal revenue laws"; it does not require that Angelini be the one who possessed the requisite intention. If, for example, Angelini had left the money in a bookmaker's office without having any reason to know that illegal activities would take place there, the Government reads the statute as permitting confiscation if it can be shown that the *bookmaker* used Angelini's money in illegal wagering activities. Since, under the Government's view, the guilt or innocence of the actual owner of the money is irrelevant in an action under § 7302, the Government urges that the present forfeiture should not be considered the result of a "criminal" proceeding for Fifth Amendment purposes.

If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning. Cf. *Morissette* v. *United States*, 342 U. S. 246 (1952). However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinarily broad scope. See *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505 (1921); *United States* v. *One Ford Coupe*, 272 U. S. 321 (1926). Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. See *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399–401 (1878); *The Palmyra*, 12 Wheat. 1, 14 (1827). Simply put, the theory has been that if the object is "guilty," it should be held forfeit. In the words of a medieval English writer, "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and

yet no default is in the owner." [3] The modern forfeiture statutes are the direct descendants of this heritage, which is searchingly considered by Mr. Justice Holmes in a brilliant chapter in his book, The Common Law.[4] The forfeiture action in the present case was instituted as an *in rem* proceeding in which the money itself is the formal respondent. More remarkable, the Government's complaint charges the *money* with the commission of an actionable wrong.[5]

It would appear then that history does support the Government's contention regarding the operation of this forfeiture statute, as do several decisions rendered by the courts of appeals.[6] But before the Government's attempt to distinguish the *Boyd* case could even begin to convince, we would first have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure

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[3] Quoted from O. Holmes, The Common Law 23 (M. Howe ed. 1963).

[4] Holmes, *supra*, n. 3, Lecture 1.

[5] The libel charged that: "On one or more of the aforementioned dates . . . aforesaid respondents [*i. e.*, the money] had been used and were intended to be used in violation of the Internal Revenue Laws of the United States of America. . . . WHEREFORE, FRANK E. McDONALD, United States Attorney for the Northern District of Illinois . . . prays . . . That aforesaid respondents be adjudged and decreed forfeited to the UNITED STATES OF AMERICA." App. 5–6.

[6] *United States* v. *Bride*, 308 F. 2d 470 (CA9 1962); *United States* v. *One 1958 Pontiac Coupe*, 298 F. 2d 421 (CA7 1962); cf. *United States* v. *One 1957 Oldsmobile Automobile*, 256 F. 2d 931 (CA5 1958).

of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism.[7] And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. See, *e. g., Goldsmith-Grant Co.* v. *United States, supra.* Cf. *United States* v. *One Ford Coach,* 307 U. S. 219, 236–237 (1939).

We need not pursue that inquiry once again, however, because we think that the Government's argument fails on another score. For the broad language of § 7302 cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law . . . ." 19 U. S. C. § 1618.[8] Upon this showing, the Secretary is authorized to return the seized property "upon such terms and conditions as he deems reasonable and just." It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded. *United States* v. *Edwards,* 368 F. 2d 722 (CA4 1966); *Cotonificio Bustese, S. A.* v. *Morgenthau,* 74 App. D. C. 13, 121 F. 2d 884 (1941) (Rutledge, J.). When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those

[7] 1 W. Blackstone, Commentaries, c. 8, *300.

[8] Although this statute appears in Title 19, regulating forfeitures under the customs laws, 26 U. S. C. § 7327 provides that: "The provisions of law applicable to the remission or mitigation by the Secretary or his delegate of forfeitures under the customs laws shall apply to forfeitures incurred or alleged to have been incurred under the internal revenue laws."

who are significantly involved in a criminal enterprise.[9] It follows from *Boyd*, *Marchetti*, and *Grosso* that the Fifth Amendment's privilege may properly be invoked in these proceedings.[10]

II

The Government next contends that in any event our decisions in *Marchetti* and *Grosso* should not be retroactively applied to govern seizures of property taking place before these decisions were handed down on January 29, 1968. It is said that in reliance on the Court's earlier decisions in *Kahriger* and *Lewis*,[11] which upheld the validity of the gambling tax and registration require-

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[9] It is noteworthy that the libel instituted by the United States made claim to the $8,674 because "a business was being *operated by Donald Angelini*, in violation of [the gambling tax provisions]," App. 5 (emphasis supplied), and that the evidence introduced at trial was consistent only with this theory of liability.

[10] In the present case, the Government has not suggested that the Fifth Amendment provides Angelini with a defense only with respect to his failure *to file* the required registration and tax forms, and that the gambler's failure *to pay* the required tax may still be punished consistently with *Marchetti* and *Grosso*. This argument was properly abandoned by the Solicitor General on reargument in *Marchetti* and *Grosso*, see Brief for the United States on Reargument 37–41, *Marchetti* v. *United States* and *Grosso* v. *United States*, *supra*, and we held in *Grosso* that, "[a]lthough failures to pay the excise tax and to file a return are separately punishable under 26 U. S. C. § 7203, the two obligations must be considered inseparable for purposes of measuring the hazards of self-incrimination which might stem from payment of the excise tax." 390 U. S., at 65. Similarly, *Marchetti* ruled that: "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure." 390 U. S., at 42–43, and see n. 3. Consequently, it appears clear that the Fifth Amendment provides gamblers in Angelini's position with a complete defense.

[11] *United States* v. *Kahriger*, 345 U. S. 22 (1953); *Lewis* v. *United States*, 348 U. S. 419 (1955).

ments, "$6,686,098.22 worth of money and property has been seized under 26 U. S. C. 7302." Brief for the United States 32–33. The Solicitor General concedes, however, that this figure overestimates the Government's stake in the retroactivity question since "there are no reliable statistics indicating what percentage [of the property seized] was eventually returned to claimants" who proved to the Secretary of the Treasury that they were not significantly involved in criminal gambling activities. *Id.*, at 33. Nevertheless, the Government contends that simply because some litigation may be anticipated as gamblers attempt to reclaim their property, the retroactive effect of the new rule should be limited.

We cannot agree. Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967). Rather, *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance. These cases held that gamblers in Angelini's position had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them. In the absence of a waiver of that right, such persons could not properly be prosecuted at all.

Given the aim of the *Marchetti-Grosso* rule, it seems clear that the Government must be required to undergo the relatively insignificant inconvenience involved in defending any lawsuits that may be anticipated. Indeed, this conclusion follows *a fortiori* from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the

factfinding process at trial.[12] In those cases, retroactivity was held required because the failure to employ such rules at trial meant there was a significant chance that innocent men had been wrongfully punished in the past. In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity.[13]

Affirmed.

MR. JUSTICE BLACK concurs in the Court's judgment and the opinion so far as it goes. He would go further and now overrule *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and its progeny.

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court. The dissent would have us hold that the Government may continue indefinitely to enforce criminal penalties against individuals who had the temerity to engage in conduct protected by the Bill of Rights before the day that this Court held the conduct protected. Any such holding would have no more support in reason than it does in our cases.

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[12] See, *e. g.*, *Roberts* v. *Russell*, 392 U. S. 293 (1968); *McConnell* v. *Rhay*, 393 U. S. 2 (1968); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968); *Berger* v. *California*, 393 U. S. 314 (1969).

[13] In the view of the writer of this opinion, the fact that this case had not become final by the time of this Court's decisions in *Marchetti* and *Grosso* suffices, without more, to require rejection of the Government's contention respecting nonretroactivity. See, *e. g.*, *Desist* v. *United States*, 394 U. S. 244, 256 (HARLAN, J., dissenting), and *Mackey* v. *United States*, *ante*, p. 675 (HARLAN, J., concurring in judgments and dissenting).

I

Frank recognition of the possible impact of retroactive application of constitutional decisions on the administration of criminal justice has led this Court to establish guidelines to determine the retroactivity of "constitutional rules of criminal procedure." *Stovall* v. *Denno*, 388 U. S. 293, 296 (1967). Since "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice," the "retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey*, 384 U. S. 719, 728 (1966). But although "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities,'" *Stovall* v. *Denno*, 388 U. S., at 298, quoting *Johnson* v. *New Jersey*, 384 U. S., at 729, as a general matter "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." *Williams* v. *United States, ante*, at 653. "Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Ibid.**

*The few cases in which we have recognized that a new constitutional rule may in some circumstances improve the accuracy of the factfinding process, while at the same time denying retroactive application to that rule, do not in my view undercut the force of these statements. The relevant cases are collected and discussed in an Appendix to this opinion, *infra*, p. 728.

The reasoning that underlies these guidelines is clear. The States and the Federal Government have, of course, a legitimate interest in the evenhanded enforcement of such sanctions as they desire to impose upon any conduct that they may constitutionally prohibit. By definition a "new rule of criminal procedure" casts no doubt upon the power of government to punish certain conduct, but only upon the legitimacy of the process by which persons were found to have engaged in that conduct. Of course a government has no legitimate interest in upholding an unconstitutional system of criminal procedure. But accepting the results that an unconstitutional procedure has reached in the past does not uphold such a system for the future. Notwithstanding the new procedural rule the government retains a legitimate interest in sanctioning conduct that it may constitutionally prohibit. Accordingly, when a new procedural rule has cast no substantial doubt upon the reliability of determinations of guilt in criminal cases, we have denied the rule retroactive effect where a contrary decision would "impose a substantial burden [of retrials] upon the . . . judicial system . . . while serving neither to redress knowing violations of [constitutional rights] nor to protect a class of persons the government has no legitimate interest in punishing." *Williams* v. *United States, ante,* at 664 (BRENNAN, J., concurring in result); see *Desist* v. *United States,* 394 U. S. 244 (1969). But since the government has no legitimate interest in punishing those innocent of wrongdoing, cf. *Thompson* v. *Louisville,* 362 U. S. 199 (1960), when a new procedural rule casts doubt upon the reliability of a substantial proportion of past convictions obtained without its protections, we have required the new rule be given full retroactive effect. *Williams* v. *United States, ante,* at 653. From this it follows *a fortiori* that a decision holding certain conduct beyond the power of government

to sanction or prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision. For the decision does far more than cast doubt upon the reliability of the guilt-determining process. It makes the question of reliability irrelevant, for it establishes beyond peradventure that the government has no legitimate interest in punishing such conduct at all. See *Ex parte Siebold,* 100 U. S. 371, 376–377 (1880). Accordingly, it may no longer continue to punish it.

II

The dissent seeks to explain its view of this case on the ground that even after this Court has declared certain individual conduct beyond the power of government to prohibit, the government retains an "interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity" by punishing those persons who engaged in constitutionally protected conduct before it was so declared by this Court. *Post,* at 735. This argument, of course, has nothing whatever to do with the rule of *law.* It exalts merely the rule of judges by approving punishment of an individual for the *lèse-majesté* of asserting a constitutional right before we said he had it. In light of our frequent reiteration that the usual mode of challenging an unconstitutional statute is *expected to be violation of the statute* and adjudication of the constitutional challenge in a criminal proceeding, see, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943); *Dombrowski* v. *Pfister,* 380 U. S. 479, 484–485 (1965), it is difficult to see how this argument amounts to more than a flat statement that those who assert their constitutional rights before we have declared them may not do so with impunity.

If the dissent today means what it says, it would appear to follow that Virginia might keep in jail interracial married couples whose only offense was cohabitation within the State, so long as the cohabitation was prior to *Loving* v. *Virginia*, 388 U. S. 1 (1967); or that Arkansas could still discharge school teachers who taught evolution before we struck down the relevant statute in *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). Of course the dissenters would never uphold such action. But if there is any distinction between these cases and the case at bar, it can only be that Angelini is asserting his privilege against self-incrimination, rather than a right under the First or Fourteenth Amendment. Whatever may be the relevance of the source of a new constitutional rule in determining the extent to which it affects the reliability of the factfinding process at trial, however, there is no justification for allowing the government greater power to vindicate its nonexistent interest in enforcing an unconstitutional statute that punishes assertion of the privilege against self-incrimination than to vindicate its interest in enforcing a statute that punishes the assertion of any other constitutional right.

APPENDIX TO OPINION OF BRENNAN, J., CONCURRING

Our cases show little deviation from the principle that new constitutional rules of criminal procedure that affect the integrity of the factfinding process will, in general, be retroactively applied. In *Tehan* v. *Shott*, 382 U. S. 406 (1966), we denied retroactive effect to *Griffin* v. *California*, 380 U. S. 609 (1965), despite our recognition that the privilege against self-incrimination which *Griffin* protected did in some circumstances serve as an adjunct to truth. 382 U. S., at 414–415, n. 12, quoting *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964). But in *Tehan* we noted specifically that the privilege

against self-incrimination is not primarily "an adjunct to the ascertainment of truth," 382 U. S., at 416, and emphasized as well that retroactive application of *Griffin* would, in the States concerned, "have an impact upon the administration of their criminal law so devastating as to need no elaboration." *Id.*, at 419. Similarly, in *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), we denied retroactive effect to *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), notwithstanding our recognition that the principles announced in those cases would in some circumstances guard against the possibility of unreliable confessions. 384 U. S., at 730. But we emphasized in *Johnson* that strict pre-*Miranda* standards were available to those desiring to test the admissibility of confessions, *ibid.*, as well as pointing out the severe impact that retroactivity would have on state criminal processes. *Id.*, at 731–732. In *Stovall* v. *Denno*, 388 U. S. 293 (1967), we denied retroactive effect to *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), because of uncertainty about the frequency with which violation of the rule there announced would actually result in injustice, the availability of a due process standard to remedy at least the more serious injustices, and the "unusual force of the countervailing considerations." *Stovall* v. *Denno*, 388 U. S., at 299. Finally, in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), we denied retroactive effect to *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), holding respectively that the States must afford criminal defendants a jury trial on demand in serious criminal cases, and that the right to jury trial extends to trials for serious criminal contempts. As to *Duncan*, retroactivity was denied because we considered that there was little likelihood that bench trials, as a whole, would be unfair, and because retroactive application could in some States

reopen every conviction for serious crime. 392 U. S., at 633–634. As to *Bloom*, we recognized that one ground for the result was "the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt." *Id.*, at 634. But the firm tradition of nonjury trials in contempt cases, combined with the adverse impact of retroactivity on the administration of justice, combined to persuade us that *Bloom* should be applied prospectively only. *Id.*, at 634–635. In addition, it should be noted that this Court has not been hesitant to reverse contempt convictions because of the possibility of involvement on the part of the judge. See *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), and cases cited.

Examination of these cases, therefore, indicates that in all cases save *DeStefano/Bloom*, we regarded as relatively small the likelihood that noncompliance with the new rule would have resulted in serious injustice in any past cases. Moreover, in all cases save *Tehan* and *DeStefano/Duncan*, alternative methods were still available to those who could demonstrate that the feared injustice had in fact resulted. Taken in combination, these factors lead me to conclude that the cases discussed in this Appendix do not undercut the force of the proposition at issue.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join, dissenting.

I

None of Angelini's rights under the Fifth Amendment were violated when this forfeiture proceeding was begun and concluded in the District Court. In violation of the Internal Revenue Code, Angelini had failed to register as a gambler and to pay the related gambling tax; he

was subject to criminal penalties for the default; and *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), had specifically held that the statutory obligation to file and pay was not compulsory self-incrimination proscribed by the Fifth Amendment. The Amendment at that time afforded Angelini no defense either to a criminal charge for refusal to register and pay or to a forfeiture proceeding based on the same offenses.

After affirmance of the forfeiture judgment in the Court of Appeals, however, our decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), intervened. *Kahriger* and *Lewis* were overruled. Obligatory filing and payment were held violative of the Fifth Amendment. It followed that failure to comply with the statute thereafter could not be punished by law. Angelini now claims the benefit of the new constitutional doctrine announced by *Marchetti-Grosso.*

Of course, we are not free to set aside convictions or forfeitures at will. The forfeiture judgment imposed here must stand unless the Constitution otherwise commands. More specifically, we are empowered to set aside the judgment only if we are constitutionally compelled to give *Marchetti* and *Grosso* retroactive application.

It is now firmly settled that the Constitution does not require every new interpretation of the Bill of Rights to be retrospectively applied. The cases from *Linkletter* v. *Walker,* 381 U. S. 618 (1965), to *Williams* v. *United States, ante,* p. 646, prove at least this much. They also squarely hold that retroactive sweep of newly announced constitutional doctrine is not required where violation of that doctrine raises no substantial doubts about the factual accuracy of guilty verdicts rendered under previous law. But if the new rule is such that

its nonobservance in the past casts substantial doubt on the reliability of prior convictions, all prior verdicts involving such a violation must be set aside regardless of countervailing arguments about the impact on state and federal interests in maintaining criminal judgments.

So far, the Court and I are apparently in complete agreement. But I cannot join the Court in its disposition of this case. The majority's reasoning is simple: If we are required to apply retroactively any new constitutional interpretation casting serious doubt on the accuracy of prior verdicts, we are also compelled to set aside convictions or penalties based on conduct that subsequent decisions—expressly contrary to prior decisions of this Court—hold to be constitutionally protected. If verdicts may not stand where the new rule casts doubt on the integrity of prior trials, surely, it is argued, a judgment such as the one against Angelini must be set aside because there should never have been a trial at all.

But this approach is no more than a beguiling verbalism. There is no doubt in this case that Angelini failed to register, file his returns, and pay his tax; nor is there any suggestion that either Angelini's conviction or the instant forfeiture proceedings were in any way unfair or departed from controlling norms. The argument here is not that new constitutional insight raises doubts whether Angelini committed the acts giving rise to the forfeiture or the accuracy of the procedures employed in determining whether he acted as charged; rather, it is that the forfeiture judgment must be set aside because based on conduct which *Marchetti-Grosso* have declared to be constitutionally immune. As Angelini would have it, complete retroactivity must always be given to decisions invalidating on constitutional grounds any substantive criminal statute. Any statute

defining criminal conduct, if declared unconstitutional, is void *ab initio.*

I fail to find any such command, express or implied, in the Fifth Amendment or in any other provision of the Constitution. Nor does the Court care to explain the result it reaches. It does not embrace the theory that the Constitution must be understood always to have meant what the Court now says it means. It does not deny that this Court makes constitutional law. Nor does it assert that prior interpretations of the Constitution were never valid law and must always be disregarded. But apparently a statute making certain conduct criminal, once invalidated here, was never the law although this Court formerly held that it was and had regularly affirmed convictions under it over explicit constitutional challenge. I am not prepared to agree with this proposition.

II

Had Angelini registered and paid the federal tax and then been tried prior to *Marchetti-Grosso* for violating federal interstate gambling laws or state laws making gambling a crime, the admissions contained in his registration and gambling tax returns would have been relevant and presumptively reliable evidence of guilt, properly admissible under *Kahriger* and *Lewis.* And if after *Marchetti-Grosso,* Angelini had complained about the use of this evidence, *Tehan* v. *Shott,* 382 U. S. 406 (1966), and *Johnson* v. *New Jersey,* 384 U. S. 719, 732 (1966), would surely dictate denial of relief whether Angelini came here on direct review of his conviction or from denial of collateral relief.

If we would not upset a conviction where Angelini registered and filed tax returns and these filed statements were used against him in a criminal prosecution,

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neither should we implement the *Marchetti-Grosso* reading of the Fifth Amendment by applying it where there has been no self-incrimination but a conviction or forfeiture for failure to register or pay the tax. In *Mackey* v. *United States, ante*, p. 667, it seems to me that a major predicate for permitting Mackey's gambling tax returns to be used against him in a criminal prosecution was that those returns were not compelled admissions—that Mackey's Fifth Amendment rights were not violated by the statutory requirement to register, file returns, and pay the gambling tax, for that issue was controlled by *Kahriger* and *Lewis*, not by *Marchetti* and *Grosso*. Angelini is in no better position than was Mackey to argue successfully that the registration statute was invalid when he decided to ignore it or that the statute called for "compelled" incriminating admissions. To urge that the integrity of the forfeiture proceeding against Angelini is destroyed because *Marchetti-Grosso* forbade any forfeitures at all is merely to reassert or assume that those decisions must be given retroactive effect. In terms of implementing the purpose of *Marchetti* and *Grosso* and the Fifth Amendment, I see no difference between convictions or forfeitures for noncompliance with the statute and those obtained by using the fruits of compliance with that same statute. Angelini's funds were validly and accurately forfeited for failing to file his returns contrary to a statute that this Court had upheld as consistent with the Fifth Amendment. Relief to Angelini would merely remove retroactively a burden on conduct, which when judged by current cases, was an exercise of his self-incrimination privilege, but which when it occurred and under the then-controlling law was a breach of duty he was legally bound to perform.

III

It is true that if this judgment of forfeiture were affirmed the law would countenance a penalty for past criminal acts that are wholly innocent under the current law. It is also true that when the law no longer censures certain acts, the Government surrenders its interest in deterring prior delinquents or the public generally from engaging in a particular form of conduct that once was criminal but is now unobjectionable behavior. But there remains the interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity. Clearly, the Constitution does not require the authorities to vindicate this interest upon the demise of a criminal law and some of us may think it unwise to do so. But is the interest so insubstantial that the Constitution forbids a State or the Federal Government from continuing to punish behavior which was once but is not now criminal conduct? I think not.

The question is an old one for both courts and legislatures and my answer is not novel, either in the context of the repeal of a criminal statute or in the context of a court decision overruling a prior case with respect to the constitutionality of a statute.

The common law never attached complete retrospectivity to the repeal of a criminal statute. Absent statutory guidance, the judge-made rule was that those whose convictions had been finally affirmed when repeal took place received no benefit from the new rule; but repeal of a statute abated pending prosecutions and required reversal of convictions still on appeal when the law was changed. *United States* v. *Chambers,* 291 U. S. 217 (1934); *Massey* v. *United States,* 291 U. S. 608 (1934); *United States* v. *Tynen,* 11 Wall. 88 (1871); *Yeaton* v. *United States,* 5 Cranch 281 (1809); *In re Kline,* 70

Ohio St. 25, 70 N. E. 511 (1904); *State* v. *Addington*, 2 Bailey (S. C.) 516 (1831); *Ex parte Andres*, 91 Tex. Cr. R. 93, 237 S. W. 283 (1922); see also 1 Sutherland, Statutory Construction § 2046 (1943 ed.).

The courts nevertheless honored provisions in repealing statutes saving prosecutions and forfeitures for conduct committed while the former statute was in effect. *The Irresistible*, 7 Wheat. 551 (1822); 1 Sutherland, *supra*, § 2050. Moreover, in 1871, Congress enacted the following general statute which, among other things, saved ongoing criminal prosecutions from abatement following repeal of a penal statute:

> "[T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 16 Stat. 432.

This section was carried forward and eventually broadened by amendment "to provide that the expiration of a temporary statute shall not have the effect of preventing prosecution of an offense committed under the temporary statute" by making "applicable to violations of temporary statutes the same rule that is now in effect in respect to offenses against statutes that have been repealed." H. R. Rep. No. 261, 78th Cong., 1st Sess., 1 (1943).[1] Today, 46 States, as well as the Federal Gov-

[1] In a letter to the Speaker of the House of Representatives in support of this broadening amendment, Attorney General Biddle referred to the common-law rule as a "deficiency [which] has been cured as concerns offenses cognizable under a statute that has been expressly repealed, as distinguished from one that expires by its own terms." See H. R. Rep. No. 261, 78th Cong., 1st Sess., 1 (1943). He then indicated that there was doubt about whether

ernment, make provision for saving pending criminal prosecutions from the repeal of the underlying statute.[2] The prevailing legislative policy and positive law thus

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the general saving provision identical to that enacted in 1871 (by then 1 U. S. C. § 29 (1940 ed.)) applied to violations of temporary statutes that expired before prosecutions could be concluded. The Attorney General next stated that a number of wartime statutes of a temporary nature had been enacted, and that to forestall questions about their enforceability after expiration "it appears desirable to enact legislation which would expressly permit prosecutions after the lapse of such temporary statutes for violations committed while the act is in force." H. R. Rep. No. 261, *supra*, at 2.

[2] The 46 States are: Alabama: Ala. Code, Tit. 1, § 11 (1958); Alaska: Alaska Stat. § 01.05.021 (1962); Arizona: Ariz. Rev. Stat. Ann. §§ 1–246, 1–247 (1956); see also *id.*, §§ 1–244, 1–249; Arkansas: Ark. Stat. Ann. § 1–103 (1947); California: Cal. Govt. Code § 9608 (1966); Colorado: Colo. Rev. Stat. Ann. §§ 135–1–7, 135–4–7 (1963); Connecticut: Conn. Gen. Stat. Rev. § 54–194 (1968); Florida: Fla. Const., Art. 10, § 9; Georgia: Ga. Code Ann. § 26–103 (1953); Hawaii: Hawaii Rev. Laws § 1–11 (1968); Idaho: Idaho Code § 67–513 (1947); Illinois: Ill. Rev. Stat., c. 131, § 4 (1969); Indiana: Ind. Ann. Stat. §§ 1–303, 1–307 (1967); Iowa: Iowa Code § 4.1 (1) (1971); Kansas: Kan. Stat. Ann. § 77–201 (1969); Kentucky: Ky. Rev. Stat. § 446.110 (1962); Louisiana: La. Rev. Stat. § 24:171 (1950); Maine: Me. Rev. Stat. Ann., Tit. 1, § 302 (Supp. 1970–1971); Maryland: Md. Ann. Code, Art. 1, § 3 (1957); Massachusetts: Mass. Gen. Laws Ann., c. 4, § 6 (1966); Michigan: Mich. Comp. Laws § 8.4a (1948); Minnesota: Minn. Stat. § 645.35 (1967); Mississippi: Miss. Code Ann. § 2608 (1957); Missouri: Mo. Rev. Stat. § 1.160 (1969); Montana: Mont. Rev. Codes Ann. § 43–514 (1961); Nebraska: Neb. Rev. Stat. § 49–301 (1968); Nevada: Nev. Rev. Stat. § 169.235 (1968); New Hampshire: N. H. Rev. Stat. Ann. § 21:38 (1955); New Jersey: N. J. Rev. Stat. § 1:1–15 (1937); New Mexico: N. M. Const., Art. 4, § 33; New York: N. Y. Gen. Constr. Law § 94 (1951); North Carolina: N. C. Gen. Stat. §§ 164–4, 164–5 (1964); North Dakota: N. D. Cent. Code § 1–02–17 (1959) (saves penalties, fines, liabilities, or forfeitures incurred under a repealed statute and provides that the repealed act remains in force for the purpose of enforcing such fines, penalties, or forfeitures; however, unless the repealing statute expressly provides otherwise, in cases tried both before and after the repeal, the repealing statute has the effect

is that neither the repeal of a statute nor the expiration of a temporary act shall release or extinguish penalties, forfeitures, or liabilities incurred under statutes no longer in force. Conduct perfectly innocent under current law is nevertheless punishable if it occurred while a valid criminal statute proscribed it. The courts have

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of "extinguishing any jail or prison sentence that may be, or that has been, imposed by reason of said law . . . ." *Ibid.*; but see *In re Chambers*, 69 N. D. 309, 285 N. W. 862 (1939), where the court held that insofar as § 1–02–17 purported to extinguish prison sentences imposed after trial which preceded the effective date of the repealing statute, the section was unconstitutional under N. D. Const. § 76, which vests power to pardon in the Governor and the board of pardons); Ohio: Ohio Rev. Code Ann. § 1.20 (1969); Oklahoma: Okla. Const., Art. 5, § 54; Oregon: Ore. Rev. Stat. § 161.040 (1967); Rhode Island: R. I. Gen. Laws Ann. § 43–3–23 (1956); South Dakota: S. D. Compiled Laws Ann. § 2–14–18 (1967); Tennessee: Tenn. Code Ann. § 1–301 (1955); Utah: Utah Code Ann. § 68–3–5 (1968); Vermont: Vt. Stat. Ann., Tit. 1, § 214 (Supp. 1970); Virginia: Va. Code Ann. § 1–16 (1950); Washington: Wash. Rev. Code § 10.01.040 (1956); West Virginia: W. Va. Code Ann. § 2–2–8 (1966); Wisconsin: Wisc. Stat. § 990.04 (1967); Wyoming: Wyo. Stat. Ann. § 8–21 (1957).

Of the four other States, Delaware has a provision but it applies only to save prosecutions for any offenses committed under laws repealed when the State's comprehensive Code of 1953 was adopted. Del. Code Ann., Tit. 1, § 104 (1953). See also Pa. Stat. Ann., Tit. 46, § 596 (1969), a general saving provision applicable only to repeal of "civil provisions." However, under Pa. Stat. Ann., Tit. 46, § 582, if the repeal of a penal statute is accompanied by a re-enactment at the same time of the repealed law's provisions in "substantially the same terms," a prosecution will be saved. See *Commonwealth* v. *Davis*, 4 Pa. D. & C. 2d 182 (1954). Tex. Pen. Code, Art. 14.16 (1952), provides: "The repeal of a law where the repealing statute substitutes no other penalty will exempt from punishment all persons who may have violated such repealed law, unless it be otherwise declared in the repealing statute." But Tex. Pen. Code, Art. 17.19 saves prosecutions for offenses committed under statutes repealed when the new Penal Code took effect. South Carolina apparently has no general saving provision applicable to criminal prosecutions.

regularly enforced 1 U. S. C. § 109, the federal saving statute, never suggesting that it was constitutionally infirm or even fundamentally unfair and frankly recognizing that the Government is free to maintain the integrity of the law by insisting that those who violate it suffer the consequences.[3]

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[3] *United States* v. *Reisinger*, 128 U. S. 398 (1888) (enforcing one of the predecessors of 1 U. S. C. § 109); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553–555 (1954); *Moorehead* v. *Hunter*, 198 F. 2d 52 (CA10 1952); *Lovely* v. *United States*, 175 F. 2d 312, 316–318 (CA4 1949); *Rehberg* v. *United States*, 174 F. 2d 121 (CA5 1949); *Ladner* v. *United States*, 168 F. 2d 771 (CA5 1948). 1 Sutherland, Statutory Construction § 2048 (1943 ed.). See also *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119 (1947); *Duffel* v. *United States*, 95 U. S. App. D. C. 242, 221 F. 2d 523 (1954); cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 331–333 (1936); *United States* v. *Hark*, 320 U. S. 531 (1944) (reversing an order quashing an indictment charging violation of maximum price regulation that had been revoked prior to the date the indictment was returned on the ground that the statute under which the regulation was issued remained in effect after revocation).

In *United States* v. *Chambers*, 291 U. S. 217 (1934), this Court was faced with the question of what effect repeal of the Eighteenth Amendment by the Twenty-first Amendment on December 5, 1933, would have on criminal prosecutions continued or begun under the National Prohibition Act after the repealing amendment had been ratified. In an opinion by Chief Justice Hughes, the Court applied the common-law rule of *Tynen* and *Yeaton* and held that pending prosecutions, including those still on direct review, would be abated. The question of whether the Twenty-first Amendment had any effect on convictions which had become final before the date of ratification was specifically reserved. 291 U. S., at 226. Thereafter, the courts of appeals held that defendants whose convictions had become final before the Twenty-first Amendment was ratified had to serve their sentences. *United States ex rel. Randall* v. *United States Marshal*, 143 F. 2d 830 (CA2 1944); *Odekirk* v. *Ryan*, 85 F. 2d 313 (CA6 1936); *United States ex rel. Cheramie* v. *Dutton*, 74 F. 2d 740 (CA5 1935), cert. denied *sub nom. United States ex rel. Cheramie* v. *Freudenstein*, 295 U. S. 733 (1935); *Rives* v. *O'Hearne*, 64 App. D. C. 48, 73 F. 2d 984 (1934); *Moss* v. *United States*, 72 F. 2d 30 (CA4 1934); *The Helen*, 72 F. 2d 772

Of course, the case before us does not involve the legislative repeal of an existing criminal statute but a construction of the Fifth Amendment by this Court contrary to past interpretations of that amendment and having the effect of barring enforcement of 26 U. S. C. § 7203 against those refusing to register as gamblers and pay the gambling tax. As to those persons, at least those failing to file and pay after January 29, 1968, 26 U. S. C. § 7203 may not constitutionally be enforced. Does such a declaration concerning a law which this Court had previously validated mean that the law was to this extent void from the moment it was enacted? If so, it would appear that not only should pending prosecutions abate, but also all previous convictions should be vulnerable to

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(CA3 1934) (common-law rule of *Chambers* applied to a forfeiture); *United States ex rel. Benton* v. *Hill*, 72 F. 2d 826 (CA3 1934); *United States ex rel. Voorhees* v. *Hill*, 72 F. 2d 826 (CA3 1934); *United States ex rel. Nerbonne* v. *Hill*, 70 F. 2d 1006 (CA3 1934).

In *Chambers*, the Court rejected the Government's suggestion that the general saving provision—the predecessor of § 109—supported the continuation of prosecutions pending when the repealing amendment was ratified. The saving statute was discussed as passed in recognition of the principle that unless a repealed law is "continued in force by competent authority," 291 U. S., at 224, repeal halts enforcement. Congress had the power to propose the Twenty-first Amendment so as to include a saving provision, but not to vary the amendment's terms once it was adopted. Since as adopted the amendment gave Congress no power to extend the operation of the National Prohibition Act, which was deprived of its force by the action of the people in repealing the Eighteenth Amendment, the Court concluded that the general saving provision had no application. *Ibid.*

There can be no doubt that a Court which had just decided *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932), would consider the judiciary as "competent authority" to fashion a rule that a statute, though changed by interpretation, nevertheless remained in force and applicable to events that transpired before the change occurred. See nn. 6–7, *infra*, and accompanying text.

habeas corpus petitions alleging that petitioners are in custody pursuant to an unconstitutional law. Or should the statute validated by prior Court decisions be considered a valid law until the date of its invalidation and its demise treated as Congress treats the repeal of a statute?

Neither of these alternatives has found unqualified support in this Court. There are statements in the cases indicating that an unconstitutional law must be treated as having no effect whatsoever from the very date of its enactment. *Chicago, I. & L. R. Co.* v. *Hackett,* 228 U. S. 559 (1913); *Norton* v. *Shelby County,* 118 U. S. 425 (1886); *Ex parte Siebold,* 100 U. S. 371, 376 (1880).[4] But this view has not prevailed. In *Gelpcke* v. *City of Dubuque,* 1 Wall. 175, 206 (1864), the city issued bonds pursuant to legislative authorization that the Iowa Supreme Court had upheld as constitutional. The same court then overruled itself and held the statutory authorization to be void. This Court refused to allow the state court to give retroactive effect to the overruling decision by invalidating the bonds, saying that the legislature could not impair the obligation of an existing contract and that the same principle applies "where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court." [5]

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[4] In *Norton,* Mr. Justice Field declared:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U. S., at 442.

[5] The Court so held over the dissent of Mr. Justice Miller who said:

"The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such

Great Northern R. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932),[6] was another indication that the Court clearly rejected any all-inclusive principle of retroactivity for court decisions declarative of a change in the law. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), this Court was faced with the question whether retroactive effect should be accorded an earlier decision declaring a federal statute unconstitutional, *Ashton* v. *Cameron County District*,

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cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859." 1 Wall., at 211.

See also *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 492 (1900); *Douglass* v. *County of Pike*, 101 U. S. 677, 687 (1880).

[6] *Sunburst* rejected the claim that a state court could not constitutionally refuse to make its ruling retroactive. Mr. Justice Cardozo held:

"A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." 287 U. S. 358, at 364–365 (citations omitted, footnotes omitted, emphasis in original).

298 U. S. 513 (1936). Referring expressly to *Norton*, Chief Justice Hughes stated that the broad language in that opinion "must be taken with qualifications." 308 U. S., at 374. As he asserted:

> "The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Ibid.*

This clear rejection of the idea that every decision declaring a statute unconstitutional had retroactive sweep was one of the underpinnings of *Linkletter* v. *Walker*, 381 U. S. 618, 622–629 (1965), and has been invoked since *Linkletter*.[7] It was against this background that

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[7] See *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 213–215 (1970); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); cf. *Tehan* v. *Shott*, 382 U. S. 406 (1966), where the prosecutor's comment about the defendant's failure to take the stand was authorized, when made, by Art. I, § 10, of the Constitution of Ohio and Ohio Rev. Code § 2945.43.

this Court has fashioned rules to deal with the impact on pending and closed criminal cases of decisions that overruled prior decisions construing the various provisions of the Bill of Rights. And it is against this background that I would reverse the judgment of the Court of Appeals.

Syllabus

UNITED STATES *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13. Argued November 10, 1969—Reargued October 20, 1970—Decided April 5, 1971

Respondent was convicted in 1966 of narcotics violations following a trial where evidence was admitted of certain incriminating statements of respondent that were overheard by warrantless electronic eavesdropping by Government agents by means of a transmitter which an informer consented to wear during his meetings with respondent. The informer could not be located at trial, and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. Reading *Katz* v. *United States*, 389 U. S. 347 (1967), as overruling *On Lee* v. *United States*, 343 U. S. 747 (1952), the Court of Appeals held that the agents' testimony was impermissible under the Fourth Amendment, and reversed respondent's conviction. *Held:* The judgment is reversed. Pp. 748–756.

405 F. 2d 838, reversed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The Government's use of agents who themselves may reveal the contents of conversations with an accused does not violate the Fourth Amendment, and this Court's decision in *Katz* v. *United States*, *supra*, does not disturb the rationale of *On Lee*, *supra*, in this respect and require a different result because the agent uses electronic equipment to transmit the conversations to other agents. Pp. 748–754.

2. The unavailability of the informant as a witness does not create any Fourth Amendment issue. Pp. 753–754.

3. Since the decision in *Katz* v. *United States*, *supra*, was not retroactive, *Desist* v. *United States*, 394 U. S. 244, the Court of Appeals erred in not adjudicating this case by the pre-*Katz* law established by *On Lee* to the effect that the electronic surveillance did not involve a Fourth Amendment violation. P. 754.

MR. JUSTICE BLACK concurred in the judgment for the reasons set forth in his dissent in *Katz* v. *United States*, 389 U. S. 347, 364. P. 754.

MR. JUSTICE BRENNAN, to the extent that he joined in the Court's judgment, concluded that *Desist* v. *United States, supra,* requires reversal of the Court of Appeals' judgment. P. 755.

WHITE, J., announced the Court's judgment, and delivered an opinion in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment, *post,* p. 754. BRENNAN, J., filed an opinion concurring in the result, *post,* p. 755. DOUGLAS, J., *post,* p. 756, HARLAN, J., *post,* p. 768, and MARSHALL, J., *post,* p. 795, filed dissenting opinions.

Assistant Attorney General Wilson reargued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Joseph J. Connolly, John S. Martin, Jr., Jerome M. Feit, Beatrice Rosenberg,* and *Sidney M. Glazer.*

John L. Boeger reargued the cause for respondent. With him on the brief were *Morris A. Shenker* and *Chauncey Eskridge.*

Abraham Glasser and *Maurice Edelbaum* filed a brief for John G. Broady et al. as *amici curiae* urging affirmance.

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics violative of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. He was fined and sentenced as a second offender to 25-year concurrent sentences. The issue before us is whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents

overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person.[1] On four occasions the conversations took place in Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the house using a radio receiver. Four other conversations—one in respondent's home, one in a restaurant, and two in Jackson's car—were overheard by the use of radio equipment. The prosecution was unable to locate and produce Jackson at the trial and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. The jury returned a guilty verdict and defendant appealed.

The Court of Appeals read *Katz* v. *United States*, 389 U. S. 347 (1967), as overruling *On Lee* v. *United States*, 343 U. S. 747 (1952), and interpreting the Fourth Amendment to forbid the introduction of the agents' testimony in the circumstances of this case. Accordingly, the court reversed but without adverting to the fact that the transactions at issue here had occurred before *Katz* was decided in this Court. In our view, the Court of Appeals misinterpreted both the *Katz* case and the Fourth Amendment and in any event erred in applying the *Katz* case to events that occurred before that decision was rendered by this Court.[2]

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[1] White argues that Jackson, though admittedly "cognizant" of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so. Similarly, we do not consider White's claim that the Government's actions violated state law.

[2] A panel of three judges on March 18, 1968, reversed the conviction, one judge dissenting. A rehearing *en banc* was granted, and on January 7, 1969, the full court followed the panel's decision, three judges dissenting. 405 F. 2d 838.

I

Until *Katz* v. *United States*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Olmstead* v. *United States*, 277 U. S. 438, 466 (1928); *Goldman* v. *United States*, 316 U. S. 129, 135–136 (1942). But where "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied" by the defendant, although falling short of a "technical trespass under the local property law," the Fourth Amendment was violated and any evidence of what was seen and heard, as well as tangible objects seized, was considered the inadmissible fruit of an unlawful invasion. *Silverman* v. *United States*, 365 U. S. 505, 509, 511 (1961); see also *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Berger* v. *New York*, 388 U. S. 41, 52 (1967); *Alderman* v. *United States*, 394 U. S. 165, 177–178 (1969).

Katz v. *United States*, however, finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence. In that case government agents, without petitioner's consent or knowledge, attached a listening device to the outside of a public telephone booth and recorded the defendant's end of his telephone conversations. In declaring the recordings inadmissible in evidence in the absence of a warrant authorizing the surveillance, the Court overruled *Olmstead* and *Goldman* and held that the absence of physical intrusion into the telephone booth did not justify using electronic devices in listening to and recording Katz' words, thereby vio-

lating the privacy on which he justifiably relied while using the telephone in those circumstances.

The Court of Appeals understood *Katz* to render inadmissible against White the agents' testimony concerning conversations that Jackson broadcast to them. We cannot agree. *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.

Hoffa v. *United States*, 385 U. S. 293 (1966), which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, at 302. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis* v. *United States*, 385 U. S. 206 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez* v. *United States*, 373 U. S. 427 (1963).

Conceding that *Hoffa*, *Lewis*, and *Lopez* remained unaffected by *Katz*,[3] the Court of Appeals nevertheless

[3] It follows from our opinion that we reject respondent's contentions that *Lopez* should be overruled.

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read both *Katz* and the Fourth Amendment to require a different result if the agent not only records his conversations with the defendant but instantaneously transmits them electronically to other agents equipped with radio receivers. Where this occurs, the Court of Appeals held, the Fourth Amendment is violated and the testimony of the listening agents must be excluded from evidence.

To reach this result it was necessary for the Court of Appeals to hold that *On Lee* v. *United States* was no longer good law. In that case, which involved facts very similar to the case before us, the Court first rejected claims of a Fourth Amendment violation because the informer had not trespassed when he entered the defendant's premises and conversed with him. To this extent the Court's rationale cannot survive *Katz*. See 389 U. S., at 352–353. But the Court announced a second and independent ground for its decision; for it went on to say that overruling *Olmstead* and *Goldman* would be of no aid to On Lee since he "was talking confidentially and indiscreetly with one he trusted, and he was overheard. . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here." 343 U. S., at 753–754. We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case,[4] nor are we now inclined to overturn this view of the Fourth Amendment.

[4] Other courts of appeals have considered *On Lee* viable despite *Katz*. *Dancy* v. *United States*, 390 F. 2d 370 (CA5 1968); *Long* v. *United States*, 387 F. 2d 377 (CA5 1967); *Koran* v. *United States*,

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa* v. *United States,* 385 U. S., at 300–303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez* v. *United States, supra;* (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee* v. *United States, supra.* If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now

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408 F. 2d 1321 (CA5 1969). See also *United States* v. *Kaufer,* 406 F. 2d 550 (CA2), aff'd *per curiam,* 394 U. S. 458 (1969); *United States* v. *Jackson,* 390 F. 2d 317 (CA2 1968); *Doty* v. *United States,* 416 F. 2d 887 (CA10 1968), *id.,* at 893 (rehearing 1969).

before us. Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by *Hoffa* and *Lewis*. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez* v. *United States*, 373 U. S. 427 (1963).

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recog-

nition, particularly under the Fourth Amendment which is ruled by fluid concepts of "reasonableness."

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure. Our opinion is currently shared by Congress and the Executive Branch, Title III, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U. S. C. § 2510 *et seq.* (1964 ed., Supp. V), and the American Bar Association. Project on Standards for Criminal Justice, Electronic Surveillance § 4.1 (Approved Draft 1971). It is also the result reached by prior cases in this Court. *On Lee, supra; Lopez* v. *United States, supra.*

No different result should obtain where, as in *On Lee* and the instant case, the informer disappears and is un-

available at trial; for the issue of whether specified events on a certain day violate the Fourth Amendment should not be determined by what later happens to the informer. His unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights.

II

The Court of Appeals was in error for another reason. In *Desist* v. *United States*, 394 U. S. 244 (1969), we held that our decision in *Katz* v. *United States* applied only to those electronic surveillances that occurred subsequent to the date of that decision. Here the events in question took place in late 1965 and early 1966, long prior to *Katz*. We adhere to the rationale of *Desist*, see *Williams* v. *United States*, *ante*, p. 646. It was error for the Court of Appeals to dispose of this case based on its understanding of the principles announced in the *Katz* case. The court should have judged this case by the pre-*Katz* law and under that law, as *On Lee* clearly holds, the electronic surveillance here involved did not violate White's rights to be free from unreasonable searches and seizures.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE BLACK, while adhering to his views expressed in *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965), concurs in the judgment of the Court for the reasons set forth in his dissent in *Katz* v. *United States*, 389 U. S. 347, 364 (1967).

MR. JUSTICE BRENNAN, concurring in the result.

I agree that *Desist* v. *United States,* 394 U. S. 244 (1969), requires reversal of the judgment of the Court of Appeals. Therefore, a majority of the Court supports disposition of this case on that ground. However, my Brothers DOUGLAS, HARLAN, and WHITE also debate the question whether *On Lee* v. *United States,* 343 U. S. 747 (1952), may any longer be regarded as sound law. My Brother WHITE argues that *On Lee* is still sound law. My Brothers DOUGLAS and HARLAN argue that it is not. Neither position commands the support of a majority of the Court. For myself, I agree with my Brothers DOUGLAS and HARLAN. But I go further. It is my view that the reasoning of both my Brothers DOUGLAS and HARLAN compels the conclusion that *Lopez* v. *United States,* 373 U. S. 427 (1963), is also no longer sound law. In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez.* For I adhere to the dissent in *Lopez,* 373 U. S., at 446–471, in which, to quote my Brother HARLAN, *post,* at 778 n. 12, "the doctrinal basis of our subsequent Fourteenth Amendment decisions may be said to have had its genesis." *Katz* v. *United States,* 389 U. S. 347 (1967), adopted that "doctrinal basis" and thus, it seems to me, agreed with the argument in the *Lopez* dissent that "subsequent decisions and subsequent experience have sapped whatever vitality [*On Lee*] may once have had; that it should now be regarded as overruled" and that the situation in *Lopez* "is rationally indistinguishable." 373 U. S., at 447. The reasons in support of those conclusions are set forth fully in the *Lopez*

dissent and need not be repeated here. It suffices to say that for those reasons I remain of the view that the Fourth Amendment imposes the warrant requirement in both the *On Lee* and *Lopez* situations.

MR. JUSTICE DOUGLAS, dissenting.

I

The issue in this case is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as "eavesdropping," we now call "electronic surveillance"; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held "reasonable" within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of "commerce" would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.

That is why a "strict construction" of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored.

When Franklin D. Roosevelt on May 21, 1940, authorized wiretapping in cases of "fifth column" activities and sabotage and limited it "insofar as possible to aliens," he said that "under ordinary and normal circumstances

wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights." See Appendix I to this dissent. Yet as Judge Ferguson said in *United States* v. *Smith*, 321 F. Supp. 424, 429:

> "[T]he government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection. The government can, of course, investigate and prosecute criminal violations whenever these organizations, or rather their individual members, step over the line of political theory and general advocacy and commit illegal acts."

Today no one perhaps notices because only a small, obscure criminal is the victim. But every person is the victim, for the technology we exalt today is everyman's master. Any doubters should read Arthur R. Miller's The Assault On Privacy (1971). After describing the monitoring of conversations and their storage in data banks, Professor Miller goes on to describe "human monitoring" which he calls the "ultimate step in mechanical snooping"—a device for spotting unorthodox or aberrational behavior across a wide spectrum. "Given the advancing state of both the remote sensing art and the capacity of computers to handle an uninterrupted and synoptic data flow, there seem to be no physical barriers left to shield us from intrusion." *Id.*, at 46.

When one reads what is going on in this area today, our judicial treatment of the subject seems as remote from

reality as the well-known Baron Parke was remote from the social problems of his day. See Chapman, "Big Brother" in the Justice Department, The Progressive, April 1971, p. 27.

II

We held in *Berger* v. *New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, *viz.*, there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched, and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz* v. *United States*, 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed.[1] MR. JUSTICE STEWART, speaking for the Court, said: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Id.*, at 359.

As a result of *Berger* and of *Katz*, both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

There were prior decisions representing an opposed view. In *On Lee* v. *United States*, 343 U. S. 747, an

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[1] See Greenawalt, The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation, 68 Col. L. Rev. 189; Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133; Note, Police Undercover Agents: New Threat to First Amendment Freedoms, 37 Geo. Wash. L. Rev. 634; Comment, Electronic Surveillance: The New Standards, 35 Brooklyn L. Rev. 49.

The relaxing of constitutional requirements by the Executive Branch is apparent from the Appendices to this dissent.

undercover agent with a radio transmitter concealed on his person interviewed the defendant whose words were heard over a radio receiver by another agent down the street. The idea, discredited by *Katz*, that there was no violation of the Fourth Amendment because there was no trespass, was the core of the *On Lee* decision. *Id.*, at 751–754.

Lopez v. *United States*, 373 U. S. 427, was also pre-*Berger* and pre-*Katz*. The government agent there involved carried a pocket wire recorder which the Court said "was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment." *Id.*, at 439.

MR. JUSTICE BRENNAN, dissenting, stated the philosophy of *Katz* soon to be adopted:

> "[T]here is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy. . . .
>
> ". . . Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free

society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 373 U. S., at 465–466.

It is urged by the Department of Justice that *On Lee* be established as the controlling decision in this field. I would stand by *Berger* and *Katz* and reaffirm the need for judicial supervision [2] under the Fourth Amendment of the use of electronic surveillance which, uncontrolled, promises to lead us into a police state.

These were wholly pre-arranged episodes of surveillance. The first was in the informant's home to which respondent had been invited. The second was also in the informer's home, the next day. The third was four days later at the home of the respondent. The fourth was in the informer's car two days later. Twelve days after that a meeting in the informer's home was intruded upon. The sixth occurred at a street rendezvous. The seventh was in the informer's home and the eighth in a restaurant owned by respondent's mother-in-law. So far as time is concerned there is no excuse for not seeking a warrant. And while there is always an effort involved in preparing affidavits or other evidence in support of a showing of probable cause, that burden was given constitutional sanction in the Fourth Amendment against the activities of the agents of George III. It was designed not to protect criminals but to protect everyone's privacy.

On Lee and *Lopez* are of a vintage opposed to *Berger* and *Katz*. However they may be explained, they are

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[2] *Osborn* v. *United States*, 385 U. S. 323, was held to be in that tradition, as the federal district judges, prior to the use of the recording device by the agent and with full knowledge of the alleged law violation involved, "authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth" of the charge. *Id.*, at 330.

products of the old common-law notions of trespass. *Katz,* on the other hand, emphasized that with few exceptions "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ." 389 U. S., at 357. *Camara* v. *Municipal Court,* 387 U. S. 523, put administrative searches under the Fourth Amendment. We held that administrative actions, like other searches, implicated officials in an invasion of privacy and that the Fourth Amendment was meant to guard against the arbitrariness of any such invasion. We said:

> "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.,* at 533.

In *Chimel* v. *California,* 395 U. S. 752, in considering the constitutionality of a search incident to an arrest we held that, while the area in the immediate reach of an arrestee is "reasonable" though made without a warrant, a search beyond that zone may generally be made "only under the authority of a search warrant." *Id.,* at 763. And in two "stop and frisk" cases, *Terry* v. *Ohio,* 392 U. S. 1, and *Davis* v. *Mississippi,* 394 U. S. 721, we held that any restraint of the person, however brief, was subject to judicial inquiry on "reasonableness" (392 U. S., at 19) and that "the Fourth Amendment governs all intrusions by agents of the public upon personal security . . . ." *Id.,* at 18 n. 15.

We have moved far away from the rationale of *On Lee* and *Lopez* and only a retrogressive step of large dimensions would bring us back to it.

The threads of thought running through our recent decisions are that these extensive intrusions into privacy

made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society.[3]

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance.[4]

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[3] The tyranny of surveillance that is not supervised in the Fourth Amendment manner is told by Judge Gesell in *United States* v. *Jones*, 292 F. Supp. 1001, 1008–1009, where the competition between agencies and the uncontrolled activities of subordinates ended up with Government itself playing an ignoble role.

Cf. American Bar Association, Project on Standards for Criminal Justice, Electronic Surveillance §§ 4.1, 5.2 (Approved Draft 1971).

[4] Congressman Mikva of Illinois, in speaking of the spread of military surveillance of civilians—another facet of the problem in the instant case—recently said:

"At one pont they referred to 'infiltrating public meetings' at which Senator Stevenson and I spoke, and I wondered how you 'infiltrate' a public meeting. Perhaps they wanted to compile evidence to be used in some future military court—evidence that I was disloyal to the military establishment because I suggested that we cut manpower by ten per cent last year, or because I voted against their appropriations in the two years I've been here.

. . . . . .

"When they start investigating political figures, there is no place you can draw the line and maintain any kind of civilian control. . . .

. . . . . .

"We have become a fearful people. There was a time when we feared only our enemies abroad. Now we seem to be as fearful of our enemies at home, and depending on whom you talk to, those enemies can include people under thirty, people with foreign names, people of different races, people in the big cities. We have become a suspicious nation, as afraid of being destroyed from within as from without.

"Unfortunately, the manifestations of that kind of fear and suspicion are police-state measures." A Nation in Fear, The Progressive, Feb. 1971, pp. 18, 19–20.

Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.

The philosophy of the value of privacy reflected in the Fourth Amendment's ban on "unreasonable searches and seizures" has been forcefully stated by a former Attorney General of the United States:

> "Privacy is the basis of individuality. To be alone and be let alone, to be with chosen company, to say what you think, or don't think, but to say what you will, is to be yourself. Solitude is imperative, even in a high rise apartment. Personality develops from within. To reflect is to know yourself. Character is formed through years of self-examination. Without this opportunity, character will be formed largely by uncontrolled external social stimulations. Americans are excessively homogenized already.
>
> "Few conversations would be what they are if the speakers thought others were listening. Silly, secret, thoughtless and thoughtful statements would all be affected. The sheer numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good.

> "Invasions of privacy demean the individual. Can a society be better than the people composing it? When a government degrades its citizens, or permits them to degrade each other, however beneficent the specific purpose, it limits opportunities for individual fulfillment and national accomplishment. If America permits fear and its failure to make basic social reforms to excuse police use of secret electronic surveillance, the price will be dear indeed. The practice is incompatible with a free society." R. Clark, Crime in America 287 (1970).

Now that the discredited decisions in *On Lee* and *Lopez* are resuscitated and revived, must everyone live in fear that every word he speaks may be transmitted or recorded [5] and later repeated to the entire world? I can

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[5] Senator Edward Long, who intensively investigated wiretapping and "bugging" said:

"You would be amazed at the different ways you can now be 'bugged.' There is today a transmitter the size of an aspirin tablet which can help transmit conversations in your room to a listening post up to 10 miles away.

"An expert can devise a bug to fit into almost any piece of furniture in your room. And even if you find the bug, you will have no evidence of who put it there. A United States Senator was bugged by a transmitter secretly placed into a lamp which his wife was having fixed at the shop. When experts searched for the transmitter, it was gone.

"A leading electronics expert told my Subcommittee last year that wiretapping and bugging in industrial espionage triples every year. He said that new bugging devices are so small and cleverly concealed that it takes search equipment costing over one hundred thousand dollars and an expert with 10 years of field experience to discover them. Ten years ago, the same search for bugs could have been done with equipment costing only one-fourth as much.

"In California we found a businessman who had been so frightened by electronic eavesdropping devices which had been concealed in his

imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.[6]

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office, that he is now spending thousands of dollars having his office searched each day, taking his phone apart every morning, and stationing a special guard outside his office 24 hours a day.

"He is one of a growing number of men in industry who live in constant fear that what they say is being listened to by their competitor." 19 Adm. L. Rev. 442, 444. And see E. Long, The Intruders (1966).

[6] "A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices, and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television, and data line. Most of the 'hardware' for this physical surveillance is cheap, readily available to the general public, relatively easy to install, and not presently illegal to own. As of the 1960's, the new surveillance technology is being used widely by government agencies of all types and at every level of government, as well as by private agents for a rapidly growing number of businesses, unions, private organizations, and individuals in every section of the United States. Increasingly, permanent surveillance devices have been installed in facilities used by employees or the public. While there are defenses against 'outside' surveillance, these are so costly and complex and demand such constant vigilance that their use is feasible only where official or private matters of the highest security are to be protected. Finally, the scientific prospects for the next decade indicate a continuing increase in the range and versatility of the listening and watching devices, as well as the possibility of computer processing of recordings to identify automatically the speakers or topics under surveillance. These advances will come just at the time when personal contacts, business affairs, and government operations are being channeled more and more into electronic systems such as data-phone lines and computer communications." A. Westin, Privacy and Freedom 365–366 (1967).

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III

The decision not to make *Katz* retroactive to any electronic surveillance which occurred prior to December 18, 1967 (the day we decided *Katz*), is not, in my view, a tenable one for the reasons stated by MR. JUSTICE HARLAN and me in our dissents in *Desist* v. *United States,* 394 U. S. 244, 255, 256.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING

THE WHITE HOUSE
WASHINGTON

May 21, 1940

CONFIDENTIAL

MEMORANDUM FOR THE
ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

[SEAL] /s/ F. D. R.

APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING

ADMINISTRATIVELY CONFIDENTIAL
THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of those investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at

stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved, (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ Lyndon B. Johnson

MR. JUSTICE HARLAN, dissenting.

The uncontested facts of this case squarely challenge the continuing viability of *On Lee* v. *United States*, 343 U. S. 747 (1952). As the plurality opinion of MR. JUS-

TICE WHITE itself makes clear, important constitutional developments since *On Lee* mandate that we reassess that case, which has continued to govern official behavior of this sort in spite of the subsequent erosion of its doctrinal foundations. With all respect, my agreement with the plurality opinion ends at that point.

I think that a perception of the scope and role of the Fourth Amendment, as elucidated by this Court since *On Lee* was decided, and full comprehension of the precise issue at stake lead to the conclusion that *On Lee* can no longer be regarded as sound law. Nor do I think the date we decided *Katz* v. *United States*, 389 U. S. 347 (1967), can be deemed controlling both for the reasons discussed in my dissent in *Desist* v. *United States*, 394 U. S. 244, 256 (1969), and my separate opinion in *Mackey* v. *United States* (and companion cases), *ante*, p. 675 (the case before us being here on *direct* review), and because, in my view, it requires no discussion of the holding in *Katz*, as distinguished from its underlying rationale as to the reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee*.

I

Before turning to matters of precedent and policy, several preliminary observations should be made. We deal here with the constitutional validity of instantaneous third-party electronic eavesdropping, conducted by federal law enforcement officers, without any prior judicial approval of the technique utilized, but with the consent and cooperation of a participant in the conversation,[1]

[1] I agree with the plurality opinion, *ante*, at 747 n. 1, that the issue of the informer's consent to utilization of this technique is not properly before us. Whether persons can, consistent with constitutional prohibitions, be tricked or coerced into transmitting their conversations, with or without prior judicial approval, and, if not, whether

and where the substance of the matter electronically overheard [2] is related in a federal criminal trial by those who eavesdropped as direct, not merely corroborative, evidence of the guilt of the nonconsenting party. The magnitude of the issue at hand is evidenced not simply by the obvious doctrinal difficulty of weighing such activity in the Fourth Amendment balance, but also, and more importantly, by the prevalence of police utilization of this technique. Professor Westin has documented in careful detail the numerous devices that make technologically feasible the Orwellian Big Brother. Of immediate relevance is his observation that " 'participant recording,' in which one participant in a conversation or meeting, either a police officer or a co-operating party, wears a concealed device that records the conversation or broadcasts it to others nearby . . . is used tens of thousands of times each year throughout the country, particularly in cases involving extortion, conspiracy, narcotics, gambling, prostitution, corruption by police officials . . . and similar crimes." [3]

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other parties to the conversation would have standing to object to the admission against them of evidence so obtained, cf. *Alderman* v. *United States*, 394 U. S. 165 (1969), are questions upon which I express no opinion.

[2] In the case at hand agents were also surreptitiously placed in respondent's home at various times. No testimony by these agents was offered at trial.

[3] A. Westin, Privacy and Freedom 131 (1967). This investigative technique is also used to unearth "political" crimes. "Recordings of the private and public meetings of suspect groups [have] been growing. Police in Miami, Florida, used a hidden transmitter on a police agent to record statements made at meetings of a right-wing extremist group suspected of planning acts of terrorism. In 1964 a police undercover agent obtained recordings of incendiary statements by the leader of a Communist splinter movement in Harlem, at private meetings and at a public rally, which served as the basis for his conviction for attempting to overthrow the state government." *Ibid.*

Moreover, as I shall undertake to show later in this opinion, the factors that must be reckoned with in reaching constitutional conclusions respecting the use of electronic eavesdropping as a tool of law enforcement are exceedingly subtle and complex. They have provoked sharp differences of opinion both within and without the judiciary, and the entire problem has been the subject of continuing study by various governmental and nongovernmental bodies.[4]

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[4] Prior to *Osborn* v. *United States*, 385 U. S. 323 (1966), and *Katz* the issue before us, if raised, was usually dismissed in a routine fashion with a citation to *On Lee*, buttressed by a citation to *Lopez* v. *United States*, 373 U. S. 427 (1963), with no attempt to distinguish the two cases despite the narrow rationale of the latter. See, *e. g.*, *United States* v. *Pasquinzo*, 334 F. 2d 74, 75 (CA6 1964); *Maddox* v. *United States*, 337 F. 2d 234 (CA5 1964); but cf. *United States* v. *Stone*, 232 F. Supp. 396 (ND Tex. 1964). The few authorities post-dating *Katz* have divided on the continued viability of the *On Lee* result, compare, *e. g.*, *United States* v. *Jones*, 292 F. Supp. 1001 (DC 1968), and cases cited therein, 292 F. Supp., at 1008, with *Dancy* v. *United States*, 390 F. 2d 370 (CA5 1968) (Judge Fahy dissenting); *United States* v. *Kaufer*, 406 F. 2d 550 (CA2 1969); *People* v. *Fiedler*, 30 App. Div. 2d 476, 294 N. Y. S. 2d 368 (1968) (Justices Goldman and Bastow dissenting), aff'd without opinion, 24 N. Y. 2d 960, 250 N. E. 2d 75 (1969). Perhaps the most comprehensive treatments, examining both the case law and policy considerations underlying the precise issue—electronic surveillance with the consent of one of the parties—are by Professor Greenawalt, The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation, 68 Col. L. Rev. 189 (1968), and Professor Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133. For an interesting analysis of the impact of nonconsensual bugging on privacy and the role of prior judicial authorization see Spritzer, Electronic Surveillance By Leave of the Magistrate: The Case in Opposition, 118 U. Pa. L. Rev. 169 (1969). In addition, see American Bar Association, Project on Standards for Criminal Justice, Electronic Surveillance § 4.1 (Approved Draft 1971); J. Landynski, Search and Seizure and the Supreme Court

Finally, given the importance of electronic eavesdropping as a technique for coping with the more deep-seated kinds of criminal activity, and the complexities that are encountered in striking a workable constitutional balance between the public and private interests at stake, I believe that the courts should proceed with specially measured steps in this field. More particularly, I think this Court should not foreclose itself from reconsidering doctrines that would prevent the States from seeking, independently of the niceties of federal restrictions as they may develop, solutions to such vexing problems, see *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Ker* v. *California*, 374 U. S. 23 (1963), and see also *Berger* v. *New York*, 388 U. S. 41 (1967); *Baldwin* v. *New York*, 399 U. S. 66, 117 (1970) (dissenting opinion); *California* v. *Green*, 399 U. S. 149, 172 (1970) (concurring opinion). I also think that in the adjudication of federal cases, the Court should leave ample room for congressional developments.

198–244 (1966); Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455, 495–496 (1969); S. Dash, R. Schwartz, & R. Knowlton, The Eavesdroppers 421–441 (1959); Comment, Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope, 52 Cornell L. Q. 975 (1967); King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations, 33 Geo. Wash. L. Rev. 240 (1964); Note, Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968, 23 Rutgers L. Rev. 319 (1969); Blakey & Hancock, A Proposed Electronic Surveillance Control Act, 43 Notre Dame Law. 657 (1968); Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891 (1960); Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N. Y. U. L. Rev. 968, 973–974 (1968); Scoular, Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz, 12 St. Louis L. J. 513 (1968); 20 Syracuse L. Rev. 791 (1969); 14 Vill. L. Rev. 758 (1969).

II

On these premises I move to the problem of third-party "bugging." To begin by tracing carefully the evolution of Fourth Amendment doctrine in post-*On Lee* decisions has proved useful in several respects. It serves to cast in perspective both the issue involved here and the imperative necessity for reconsidering *On Lee* afresh. Additionally, a full exposition of the dynamics of the decline of the trespass rationale underlying *On Lee* strikingly illuminates the deficiencies of the plurality opinion's retroactivity analysis.

A

On Lee involved circumstances virtually identical to those now before us. There, Government agents enlisted the services of Chin Poy, a former friend of Lee, who was suspected of engaging in illegal narcotics traffic. Poy was equipped with a "minifon" transmitting device which enabled outside Government agents to monitor Poy's conversations with Lee. In the privacy of his laundry, Lee made damaging admissions to Poy which were overheard by the agents and later related at trial. Poy did not testify. Mr. Justice Jackson, writing for five Justices, held the testimony admissible. Without reaching the question of whether a conversation could be the subject of a "seizure" for Fourth Amendment purposes, as yet an unanswered if not completely open question,[5] the

[5] See *Goldman* v. *United States*, 316 U. S. 129 (1942). *Silverman* v. *United States*, 365 U. S. 505 (1961), made explicit that which was still unclear after *Goldman:* words overheard by trespass are subject to Fourth Amendment protection. See also *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

Court concluded that in the absence of a trespass,[6] no constitutional violation had occurred.[7]

The validity of the trespass rationale was questionable even at the time the decision was rendered. In this respect *On Lee* rested on common-law notions and looked to a waning era of Fourth Amendment jurisprudence. Three members of the Court refused to join with Justice Jackson, and within 10 years the Court expressly disavowed an approach to Fourth Amendment questions that looked to common-law distinctions. See, *e. g.*, *Jones* v. *United States*, 362 U. S. 257 (1960); *Silverman* v. *United States*, 365 U. S. 505 (1961); *Lanza* v. *New York*, 370 U. S. 139 (1962).

It is, of course, true that the opinion in *On Lee* drew some support from a brief additional assertion that "eavesdropping on a conversation, with the connivance of one of the parties" raises no Fourth Amendment problem. 343 U. S., at 754. But surely it is a misreading of that opinion to view this unelaborated assertion as a wholly independent ground for decision. At the very least, this

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[6] Mr. Justice Jackson rejected petitioner's contention that Poy's deception vitiated Lee's consent to his entry on the premises. 343 U. S., at 752.

[7] 343 U. S., at 751–752:

"The conduct of Chin Poy and agent Lee did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment. In *Goldman* v. *United States*, 316 U. S. 129 . . . , the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work, the Court expressly reserved decision as to the effect on the search-and-seizure question of a trespass in that situation. Petitioner in the instant case has seized upon that dictum, apparently on the assumption that the presence of a radio set would automatically bring him within the reservation if he can show a trespass.

"But petitioner cannot raise the undecided question, for here no trespass was committed. Chin Poy entered a place of business with the consent, if not by the implied invitation, of the petitioner."

rationale needs substantial buttressing if it is to persist in our constitutional jurisprudence after the decisions I discuss below. Indeed, the plurality opinion in the present case, in greatly elaborating the point, tacitly recognizes the analytic inability of this bare hypothesis to support a rule of law so profoundly important to the proper administration of justice. Moreover, if this was the true rationale of *On Lee* from the outset, it is difficult to see the relevance of *Desist* to the resolution of the instant case, for *Katz* surely does not speak directly to the continued viability of that ground for decision. See *Katz* v. *United States*, 389 U. S., at 363 n. (WHITE, J., concurring).

By 1963, when we decided *Lopez* v. *United States*, 373 U. S. 427, four members of the Court were prepared to pronounce *On Lee* and *Olmstead* v. *United States*, 277 U. S. 438 (1928), dead.[8] The pyre, they reasoned, had been stoked by decisions like *Wong Sun* v. *United States*, 371 U. S. 471 (1963), which, on the one hand, expressly brought verbal communication within the sweep of the Fourth Amendment,[9] and, on the other, re-

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[8] Both Chief Justice Warren, in concurrence, 373 U. S., at 441, and MR. JUSTICE BRENNAN, who wrote a dissenting opinion in which he was joined by JUSTICES DOUGLAS and Goldberg, 373 U. S., at 446, were of the view that *Olmstead* and *On Lee* should be overruled. Cf. *United States* v. *Stone*, 232 F. Supp. 396 (ND Tex. 1964).

[9] While *Silverman* v. *United States*, 365 U. S. 505, would seem to have eliminated any lingering uncertainty on this score, cf. *Goldman* v. *United States*, 316 U. S. 129, *Wong Sun* articulated the unspoken premise of *Silverman*. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman* v. *United States*, 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during

inforced our *Silverman* and *Jones* decisions which "refused to crowd the Fourth Amendment into the mold of local property law," 373 U. S., at 460 (BRENNAN, J., dissenting).

Although the Court's decision in *Lopez* is cited by the Government as a reaffirmation of *On Lee*, it can hardly be thought to have nurtured the questionable rationale of that decision or its much-criticized ancestor, *Olmstead*. To the discerning lawyer *Lopez* could only give pause, not comfort. While the majority opinion, of which I was the author, declined to follow the course favored by the dissenting and concurring Justices by sounding the death knell for *Olmstead* and *On Lee*, our holding, despite an allusion to the absence of "an unlawful . . . invasion of a constitutionally protected area," 373 U. S., at 438–439, was bottomed on two premises: the corroborative use that was made of the tape recordings, which increased reliability in the factfinding process, and the absence of a "risk" not fairly assumed by petitioner. The tape recording was made by a participant in the conversation and the opinion emphasized this absence of a third-party intrusion, expressly noting that there was no "electronic eavesdropping on a private conversation which government agents could not otherwise have overheard." 373 U. S., at 440.[10] As I point out in Part III

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an unlawful invasion has been excluded in order to enforce the basic constitutional policies. [Citation omitted.] Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." 371 U. S., at 485. While I joined Mr. Justice Clark's dissenting opinion, 371 U. S., at 498, our differences with the majority involved only their analysis of probable cause.

[10] "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the

of this opinion, it is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third parties may be simultaneously listening in.

While *Lopez* cited *On Lee* without disavowal of its holding, 373 U. S., at 438, it is entirely accurate to say that we did not there reaffirm it.[11] No decision since *Lopez* gives a breath of life to the reasoning that led to the *On Lee* and *Olmstead* results, and it required little clairvoyance to predict the demise of the basic rationale of *On Lee* and *Olmstead* foreshadowed by our subsequent opinions in *Osborn* v. *United States,* 385 U. S. 323 (1966), and *Berger* v. *New York,* 388 U. S. 41 (1967).

Only three years after *Lopez,* MR. JUSTICE STEWART writing for the Court in *Osborn* v. *United States, supra,* expressly abjured reliance on *Lopez* and, instead, approved identical conduct based on the "circumstances under which the tape recording was obtained in [that] case," facts that involved "using [a recorder] under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity'

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agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." 373 U. S., at 439.

[11] The Chief Justice and dissenters, concerned with the *possibility* that "the majority opinion *may be* interpreted as reaffirming *sub silentio* the result in *On Lee* v. *United States,*" expressly repudiated it. 373 U. S., at 441 (first emphasis added).

which the dissenting opinion in *Lopez* found necessary." *Osborn* v. *United States*, 385 U. S., at 327, 329.[12]

Since *Osborn* our decisions have shown no tolerance for the old dividing lines resting, as they did, on fiction and common-law distinctions without sound policy justification in the realm of values protected by the Fourth Amendment. Thus, in abolishing the "mere evidence rule" we announced that "the principal object of the Fourth Amendment is the protection of privacy rather than property," and once again noted the trend to discard "fictional and procedural barriers rested on property concepts." *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967). That same Term the Court demonstrated the new flexibility in Fourth Amendment doctrine when it held that the warrant protections would be applied to administrative searches. *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

Certainly if *Osborn*, *Warden*, and *Camara* did not plainly draw into question the vigor of earlier precedents, *Berger* v. *New York*, 388 U. S. 41, did, and expunged any remnants of former doctrine which might have been

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[12] In a footnote the Court in *Osborn* outlined a new approach, foreshadowed by MR. JUSTICE BRENNAN'S *Lopez* dissent, in which the doctrinal basis of our subsequent Fourth Amendment decisions may be said to have had its genesis:

"The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,' [citations omitted] could be made a precondition of lawful electronic surveillance . . . ." *Osborn* v. *United States*, 385 U. S. 323, 330 n. 9, quoting MR. JUSTICE BRENNAN'S dissenting opinion in *Lopez* v. *United States*, 373 U. S., at 464.

Judge Gesell in reviewing the precedents has recently concluded that it was *Katz*, read in conjunction with *Osborn*, that buried *On Lee*. *United States* v. *Jones*, 292 F. Supp. 1001, 1008 (DC 1968).

thought to have survived *Osborn* and *Warden.*[13] There, the Court, following a path opened by Mr. Justice Brandeis' dissent in *Olmstead,* and smoothed in *Osborn* and *Camara,* expressed concern about scientific developments that have put within the reach of the Government the private communications of "anyone in almost any given situation," 388 U. S., at 47; it left no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised "bugging." Disturbed by the extent of intrusion which "[b]y its very nature . . . is broad in scope," and noting that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices," *id.,* at 63, the Court brought to life the principle of reasonableness adumbrated in *Osborn.* Mr. Justice Clark, writing for the majority, reiterated the new approach:

> "[T]he 'indiscriminate use of such [bugging] devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments,' and imposes 'a heavier responsibility on this Court in its supervision of the fairness of procedures . . . .'" 388 U. S., at 56, quoting from *Osborn* v. *United States,* 385 U. S. 323, 329 n. 7.

Nor did the Court waver in resolve in the face of respondent's dire prediction that "neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements."[14] It

[13] See Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455, 458–459 (1969).

[14] My principal disagreement with the Court in *Berger* involved the wisdom of reviewing the New York statute on its face rather than focusing on the facts and circumstances of the particular case, and the exposition of the appropriate application of warrant principles to eavesdropping situations. 388 U. S., at 96–106.

was said that "[i]f that be true then the 'fruits' of eavesdropping devices are barred under the Amendment." 388 U. S., at 63.[15]

If *Berger* did not flatly sound a dirge for *Olmstead*, it articulated principles that led MR. JUSTICE DOUGLAS, by way of concurrence, to comment on its quiet burial. 388 U. S., at 64. While it was left to *Katz* to perform the last rites, that decision inevitably followed from *Osborn* and *Berger*. The *Berger* majority's affirmative citation of *On Lee* for the principle that "under specific conditions and circumstances" eavesdropping may be lawful, 388 U. S., at 63, serves only to underscore the emerging operative assumptions: that the particular circumstances of each case will be scrutinized to the end of ascertaining the reasonableness of the search, and that will depend in large measure on whether prior judicial authorization, based on a particularized showing, has been obtained. *Katz* v. *United States, supra.*

Viewed in perspective, then, *Katz* added no new dimension to the law. At most it was a formal dispatch of *Olmstead* and the notion that such problems may usefully be resolved in the light of trespass doctrine, and, of course, it freed from speculation what was already evident, that *On Lee* was completely open to question.

B

But the decisions of this Court since *On Lee* do more than demonstrate that the doctrine of that case is wholly open for reconsideration, and has been since well before *Katz* was decided. They also establish sound general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out

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[15] Cf. Spritzer, Electronic Surveillance By Leave of the Magistrate: The Case in Opposition, 118 U. Pa. L. Rev. 169 (1969).

at the time of *On Lee*. I have already traced some of these principles in Part II-A, *supra:* that verbal communication is protected by the Fourth Amendment, that the reasonableness of a search does not depend on the presence or absence of a trespass, and that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights.

Especially when other recent Fourth Amendment decisions, not otherwise so immediately relevant, are read with those already discussed, the primacy of an additional general principle becomes equally evident: official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement. Particularly significant in this regard are *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); *Terry* v. *Ohio*, 392 U. S. 1 (1968), and *Chimel* v. *California*, 395 U. S. 752 (1969).

In *Camara* the Court brought under the Fourth Amendment administrative searches that had once been thought to be without its sweep. In doing so the opinion emphasized the desirability of establishing in advance those circumstances that justified the intrusion into a home and submitting them for review to an independent assessor,[16] principles that this Court has always deemed to be at the core of Fourth Amendment protections.[17]

[16] See *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964), where the Court emphasized the importance of "an objective predetermination" uncomplicated by a presentation not "subtly influenced by the familiar shortcomings of hindsight judgment."

[17] The classic exposition of the purposes and importance of the warrant requirement is to be found in the opinion of Mr. Justice Jackson in his opinion for the Court in *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948):

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn

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In bringing such searches within the ambit of the warrant requirement, *Camara* rejected the notion that the "less hostile" nature of the search relegated this invasion of privacy to the "periphery" of Fourth Amendment concerns. 387 U. S., at 530. The central consideration was, the Court concluded, that these administrative actions, no less than the typical search, involved government officials in an invasion of privacy, and that it was against the possible arbitrariness of invasion that the Fourth Amendment with its warrant machinery was meant to guard. *Berger* and *Katz* built, as noted earlier, on *Osborn* v. *United States*, *supra*, and *Camara*, and gave further expression to the principle.[18] It was not enough that government agents acted with restraint, for reasonableness must in the first instance be judged in a detached realm.[19]

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by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Terry* v. *Ohio*, 392 U. S. 1 (1968); *United States* v. *Ventresca*, 380 U. S. 102 (1965); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Chapman* v. *United States*, 365 U. S. 610 (1961); *Jones* v. *United States*, 362 U. S. 257 (1960); *Jones* v. *United States*, 357 U. S. 493 (1958); *Giordenello* v. *United States*, 357 U. S. 480 (1958); *United States* v. *Jeffers*, 342 U. S. 48 (1951); *McDonald* v. *United States*, 335 U. S. 451 (1948); *Trupiano* v. *United States* 334 U. S. 699 (1948); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Agnello* v. *United States*, 269 U. S. 20 (1925).

[18] See Part II-A, *supra*. See *United States* v. *Jones*, 292 F. Supp. 1001 (DC 1968).

[19] " 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U. S. 48, 51, and that

The scope and meaning of the rule have emerged with even greater clarity by virtue of our holdings setting the boundaries for the exceptions. Recently, in *Chimel* v. *California*, 395 U. S. 752 (1969), we reiterated the importance of the prior independent determination of a neutral magistrate and underscored its centrality to the reasonableness requirement of the Fourth Amendment, and abandoned the holdings of *Harris* v. *United States*, 331 U. S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U. S. 56 (1950). We were concerned by the breadth of searches occasioned by the *Rabinowitz* rule which frequently proved to be an invitation to a hunting expedition. Searches incident to arrest, we held, must be confined to a locus no greater than necessary to prevent injury to the arresting officer or destruction of evidence. 395 U. S., at 763, 767; cf. *Terry* v. *Ohio*, 392 U. S. 1 (1968).

To complete the tapestry, the strands of doctrine reflected in the search cases must be interwoven with the Court's other contemporary holdings. Most signifi-

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searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S., at 356–357.

The warrant procedure need not always entail an inquiry into the existence of probable cause in the usual sense. Cf. *Camara* v. *Municipal Court*. For example, where an informer is being sent in to investigate a dangerous crime, and there is reason to believe his person would be in danger, monitoring might be justified and a warrant issued even though no probable cause existed to believe the particular meeting would provide evidence of particular criminal activity. Cf. *Warden* v. *Hayden*, 387 U. S. 294, 298 (1967); *McDonald* v. *United States*, 335 U. S., at 455–456; *Johnson* v. *United States*, 333 U. S., at 14–15; *Ker* v. *California*, 374 U. S. 23 (1963); *Trupiano* v. *United States*, 334 U. S. 699 (1948), all taking the view that exceptions to the warrant requirement may be made in narrowly defined special circumstances.

cant are *Terry* v. *Ohio, supra,* and *Davis* v. *Mississippi,* 394 U. S. 721 (1969), which were also harbingers of the new thrust in Fourth Amendment doctrine. There the Court rejected the contention that only an arrest triggered the "incident-to-arrest" exception to the warrant requirement of the Fourth Amendment, and held that any restraint of the person, however brief and however labeled, was subject to a reasonableness examination. 392 U. S., at 19. The controlling principle is "to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." 392 U. S., at 18 n. 15. See also *Davis* v. *Mississippi,* 394 U. S., at 727.[20]

III

A

That the foundations of *On Lee* have been destroyed does not, of course, mean that its result can no longer stand. Indeed, the plurality opinion today fastens upon our decisions in *Lopez, Lewis* v. *United States,* 385 U. S. 206 (1966), and *Hoffa* v. *United States,* 385 U. S. 293 (1966), to resist the undercurrents of more recent cases emphasizing the warrant procedure as a safeguard to privacy. But this category provides insufficient support. In each of these cases the risk the general populace faced was different from that surfaced by the instant case. No surreptitious third ear was present, and in each opinion that fact was carefully noted.

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[20] I do not consider *Chambers* v. *Maroney,* 399 U. S. 42 (1970), a retreat from the general proposition established by *Katz* and *Chimel.* While I disagreed with the Court, see my separate opinion, 399 U. S., at 55, moving vehicles have always presented a special Fourth Amendment problem. Compare *Carroll* v. *United States,* 267 U. S. 132 (1925), with *Agnello* v. *United States,* 269 U. S. 20 (1925).

In *Lewis*, a federal agent posing as a potential purchaser of narcotics gained access to petitioner's home and there consummated an illegal sale, the fruits of which were admitted at trial along with the testimony of the agent. Chief Justice Warren, writing for the majority, expressly distinguished the third-party overhearing involved, by way of example, in a case like *Silverman* v. *United States*, *supra*, noting that "there, the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house." 385 U. S., at 212. Similarly in *Hoffa*, MR. JUSTICE STEWART took care to mention that "surreptitious" monitoring was not there before the Court, and so too in *Lopez*, *supra*.

The plurality opinion seeks to erase the crucial distinction between the facts before us and these holdings by the following reasoning: if A can relay verbally what is revealed to him by B (as in *Lewis* and *Hoffa*), or record and later divulge it (as in *Lopez*), what difference does it make if A conspires with another to betray B by contemporaneously transmitting to the other all that is said? The contention is, in essence, an argument that the distinction between third-party monitoring and *other* undercover techniques is one of form and not substance. The force of the contention depends on the evaluation of two separable but intertwined assumptions: first, that there is no greater invasion of privacy in the third-party situation, and, second, that uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, given the values and goals of our political system.[21]

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[21] Professor Westin has observed:

"It is obvious that the political system in each society will be a fundamental force in shaping its balance of privacy, since certain patterns of privacy, disclosure, and surveillance are functional neces-

The first of these assumptions takes as a point of departure the so-called "risk analysis" approach of *Lewis*, and *Lopez*, and to a lesser extent *On Lee*, or the expectations approach of *Katz*. See discussion in Part II, *supra*. While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis.[22] The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants

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sities for particular kinds of political regime. This is shown most vividly by contrasting privacy in the democratic and the totalitarian state." Westin, *supra*, n. 3, at 23.

[22] See Kitch, *supra*, n. 4, at 141–142, 150–152.

should be necessary. Cf. *Terry* v. *Ohio, supra; Davis* v. *Mississippi, supra.*

B

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of "informer" investigation upheld in *Lewis* and *Hoffa.* The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.[23] Much off-hand exchange is easily for-

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[23] Greenawalt, *supra,* n. 4; Comment, Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope, 52 Cornell L. Q. 975, 983 (1967); Westin, *supra,* n. 3, at 390.

Professor Westin, in projecting the consequences of unsupervised participant monitoring, has observed:

"[E]avesdropping with the consent of one party . . . has been the basic charter for private-detective taps and bugs, for 'owner' eavesdropping on facilities that are used by members of the public, and for much free-lance police eavesdropping. Allowing eavesdropping with the consent of one party would destroy the statutory

gotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.[24] All these values are sacrificed by

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plan of limiting the offenses for which eavesdropping by device can be used and insisting on a court-order process. And as technology enables every man to carry his micro-miniaturized recorder everywhere he goes and allows every room to be monitored surreptitiously by built-in equipment, permitting eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange."

See also separate views of Senator Hart set forth in S. Rep. No. 1097, 90th Cong., 2d Sess., 175 (1968); Proposed Legislation on Wiretapping and Eavesdropping after Berger v. New York and Katz v. United States, 7 Bull. No. 2 of the Association of the Bar of the City of New York 1, 3, 22–26 (Aug. 1968).

[24] From the same standpoint it may also be thought that electronic recording by an informer of a face-to-face conversation with a criminal suspect, as in *Lopez*, should be differentiated from third-party monitoring, as in *On Lee* and the case before us, in that the latter assures revelation to the Government by obviating the possibility that the informer may be tempted to renege in his undertaking to pass on to the Government all that he has learned. While the continuing vitality of *Lopez* is not drawn directly into question by this case, candor compels me to acknowledge that the views expressed in this opinion may impinge upon that part of the reasoning in *Lopez* which suggested that a suspect has no right to anticipate unreliable testimony. I am now persuaded that such an approach misconceives the basic issue, focusing, as it does, on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy. Distinctions do, however, exist between *Lopez*, where a known Government agent uses a recording device, and this case which involves third-party overhearing. However unlikely that the participant recorder will not play his tapes, the fact of the matter is that in a third-party situation the intrusion is instantaneous. Moreover, differences in the prior relationship between the investigator and the suspect may provide a focus for future distinctions. See Greenawalt, *supra*, n. 4.

a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

It matters little that consensual transmittals are less obnoxious than wholly clandestine eavesdrops. This was put forward as justification for the conduct in *Boyd* v. *United States*, 116 U. S. 616 (1886), where the Government relied on mitigating aspects of the conduct in question. The Court, speaking through Mr. Justice Bradley, declined to countenance literalism:

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." 116 U. S., at 635.

Finally, it is too easy to forget—and, hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its "risk analysis" solely in terms of the expectations and risks that "wrongdoers" or "one contemplating illegal activities" ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk. The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that produces the results the plurality opinion ascribes to the *On Lee* rule. Abolition of *On Lee* would

not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield "wrongdoers," but to secure a measure of privacy and a sense of personal security throughout our society.

The Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

IV

I reach these conclusions notwithstanding seemingly contrary views espoused by both Congress and an American Bar Association study group.[25] Both the ABA

[25] See ABA Project, *supra*, n. 4. The commentary states at the outset: "This standard reflects the prevailing law." The drafters apparently take as their starting point the risk analysis approach, relying on cases holding that contents of letters may be revealed where otherwise lawfully obtained. *Stroud* v. *United States*, 251 U. S. 15 (1919); *Ex parte Jackson*, 96 U. S. 727, 737 (1878); see also Blakey & Hancock, A Proposed Electronic Surveillance Control Act, *supra*, n. 4, at 663, n. 11. The various state provisions are set forth in Greenawalt, *supra*, n. 4, at 207–211.

study and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U. S. C. § 2510 *et seq.* (1964 ed., Supp. V), appear to reflect little more than this Court's prior decisions. Indeed, the comprehensive provisions of Title III are evidence of the extent of congressional concern with the impact of electronic surveillance on the right to privacy. This concern is further manifested in the introductory section of the Senate Committee Report.[26] Although § 2511 (2)(c) exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and makes the fruits admissible in court, see § 2515, congressional *malaise* with such conduct is evidenced by the contrastingly limited endorsement of consensual surveillance carried out by private individuals.[27] While individual Congressmen expressed concern about and criticized the provisions for unsupervised consensual electronic surveillance contained in § 2511,[28] the Senate Committee Report comment, to the effect that "[i]t [§ 2511 (2)(c)] largely reflects existing law," S. Rep. No. 1097, 90th Cong., 2d Sess., 93–94 (1968), followed by citations to *On Lee* and *Lopez*,[29] strongly suggests that the provisions represent not intractable approval of these practices, but rather an intention to adopt these holdings and to leave to the courts the task of determining their viability in

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[26] See S. Rep. No. 1097, 90th Cong., 2d Sess., 69 (1968).

[27] See § 2511 (2)(d), which prohibits nongovernmental recording and listening when the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

[28] See S. Rep. No. 1097, *supra*, n. 26, at 175 (remarks of Sen. Hart); 114 Cong. Rec. 11598–11599, 14470–14472.

[29] S. Rep. No. 1097, *supra*, n. 26, at 93–94.

light of later holdings such as *Berger*, *Osborn*, and *Katz*.[30]

I find in neither the ABA study nor Title III any justification for ignoring the identifiable difference—albeit an elusive one in the present state of knowledge—between the impact on privacy of single-party informer bugging and third-party bugging, which in my opinion justifies drawing the constitutional line at this juncture between the two as regards the necessity for obtaining a warrant. Recognition of this difference is, at the very least, necessary to preserve the openness which is at the core of our traditions and is secure only in a society that tolerates official invasion of privacy simply in circumscribed situations.

The Fourth Amendment protects these traditions, and places limitations on the means and circumstances by which the Government may collect information about its citizens by intruding into their personal lives. The

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[30] Indeed, the plain thrust of Title III appears to be to accommodate the holdings of *Berger* and *Katz*, and provides considerable reassurance to me in adopting the views expressed herein which would doubtless, without more, cast a cloud upon the constitutionality of § 2511. Since the Title III question has been neither briefed nor argued, as this case arose prior to its enactment, I would expressly reserve judgment should it prove upon further study that Congress had an affirmative intention to restrict warrant requirements to nonconsensual surveillance. We would then have to face the question, summarily dealt with in another context in *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 n. 10 (1966), what deference should be given a congressional determination that certain procedures not plainly violations of due process, should be permitted. See Greenawalt, *supra*, n. 4, at 232 n. 207. Whether Congress may place restrictions on bugging by local law enforcement not mandated by the Fourteenth Amendment is also an unanswered question. See Spritzer, *supra*, n. 15, at 177 n. 46.

spirit of the principle is captured by the oft-quoted language of *Boyd* v. *United States,* 116 U. S., at 630:

> "The principles laid down in this opinion [speaking of *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765)] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . . ."

What this means is that the burden of guarding privacy in a free society should not be on its citizens; it is the Government that must justify its need to electronically eavesdrop.

V

Not content to rest upon the proposition that *On Lee* remains sound law, the plurality opinion would also hold that the Court of Appeals erred further in disposing "of this case based on its understanding of the principles announced in the *Katz* case," *ante,* at 754, because *Desist* v. *United States,* 394 U. S. 244 (1969), held that *Katz* governed only governmental conduct occurring after the decision in *Katz.* It is difficult to know where to begin to analyze such a truly extraordinary assertion respecting the operation of the judicial process.

Because this case is here on direct review, even were the issues squarely controlled by *Katz,* I would unhesitatingly apply here the rule there adopted, for the reasons first expressed in my dissent in *Desist,* 394 U. S., at 256, and elaborated in my separate opinion in *Mackey*

v. *United States* (and companion cases), *ante*, p. 675. I see no purpose in repeating at this point the analysis I set forth in those opinions. Suffice it to say that, in *Desist*, I went to some length to point out, by discussing a hypothetical proposition, that the failure to apply any new decision by this Court to cases which had not yet run their course on direct review was inconsistent with the case-by-case approach to constitutional decision and with the proper relationship of this Court to the lower federal courts. In particular, I noted that the logic of *Desist* suggested that it would constitute error for a lower federal court to adopt a new constitutional rule which this Court subsequently approved. 394 U. S., at 259. Today's opinion stands as eloquent evidence of that defect.

Indeed, I find this decision even more troubling than *Desist*. For the errors of *Desist* are not merely repeated here; they are plainly compounded. Upon the plurality opinion's own analysis of the instant case, it is clear that *Katz* has no direct relevance to the present viability of *On Lee*. "*Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." *Ante*, at 749. As I have already shown, one need not cite *Katz* to demonstrate the inability of *On Lee* to survive recent developments without at least substantial reformulation. To hold, then, that a mere citation of *Katz*, or drawing upon the philosophical underpinnings of that case in order to employ a general constitutional approach in tune with that of the decisions of this Court, conflicts with the holding of *Desist* is to let this obsession with prospectivity run riot.

Apparently *Desist* is now to be understood as holding that all lower federal courts are disabled from adjudicating on their merits all allegations of Fourth Amendment error not squarely supported by a prior decision of this Court. If so, one wonders what purpose is served by providing intermediate appellate review of constitutional issues in the federal criminal process. We must not forget that this Court is not the only tribunal in the entire federal system charged with a responsibility for the nurture and development of the Fourth Amendment. It is one thing to disable all federal courts, including this Court, from applying the settled law of the land to cases and controversies before them—as *Desist* does with *Katz*—and at least another giant step backward to preclude lower courts from resolving wholly disparate controversies in the light of constitutional principles. Can it be seriously contended, as the plurality opinion necessarily implies, that the Court of Appeals should not be reversed today on these alternative grounds had it simply omitted to discuss *Katz*? To force lower federal courts to adjudicate controversies either mechanistically or disingenuously is for me indefensible. Yet this is precisely what the plurality opinion does with its assertion that it is error for lower courts to "dispose" of a case based on their "understanding of the principles announced" in *Katz* for the next year or so.

I would hold that *On Lee* is no longer good law and affirm the judgment below.

MR. JUSTICE MARSHALL, dissenting.

I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case. In this regard I agree with the dissents of MR. JUSTICE

DOUGLAS and MR. JUSTICE HARLAN. In short, I believe that *On Lee* v. *United States*, 343 U. S. 747 (1952), cannot be considered viable in light of the constitutional principles articulated in *Katz* v. *United States*, 389 U. S. 347 (1967), and other cases. And for reasons expressed by Mr. Justice Fortas in dissent in *Desist* v. *United States*, 394 U. S. 244, 269 (1969), I do not think we should feel constrained to employ a discarded theory of the Fourth Amendment in evaluating the governmental intrusions challenged here.

HILL *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 51. Argued January 19, 1970—Reargued October 21, 1970—Decided April 5, 1971

Two men, who were driving petitioner Hill's car, were arrested for narcotics possession. A search of the car disclosed property stolen in a robbery the previous day. Both men admitted taking part in the robbery and implicated Hill, who shared an apartment with one of them. The guns used in the robbery and other stolen property were reported to be in the apartment. An investigating officer checked official records on Hill, verifying his association with one of the informants, his description, address, and make of car. The police, with probable cause to arrest Hill, but without a search or arrest warrant, went to his apartment, and there found a man matching Hill's description. The arrestee denied that he was Hill (and, in fact, he was not), and denied knowledge of any guns in the apartment, but the police, who spotted a gun and ammunition in plain view, arrested the man, searched the apartment, and seized guns, stolen property, other evidentiary items, and two pages of Hill's diary. Hill was convicted of robbery, substantially on the basis of items seized in the search. The trial judge ruled that the police acted in good faith in believing the arrestee was Hill. The District Court of Appeal agreed that the officers acted in good faith and that the arrest was valid, but thought the search unreasonable. The California Supreme Court reversed, sustaining both the arrest and the search. Hill argues that *Chimel* v. *California*, 395 U. S. 752, narrowing the permissible scope of searches incident to arrest, decided after the affirmance of his conviction by the state courts, should be applied to his case in this Court on direct review. *Held:*

1. *Chimel, supra,* is inapplicable to searches antedating that decision, regardless of whether the case is on direct or collateral review or involves state or federal prisoners. *Williams* v. *United States, ante,* p. 646. P. 802.

2. The arrest and search were valid under the Fourth Amendment, since the police had probable cause to arrest Hill and reasonably believed the arrestee was Hill. Accordingly, they were entitled to do what the law allowed them to do had the arrestee in fact been Hill, that is, to search incident to arrest and to seize evi-

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dence of the crime they had probable cause to believe Hill committed. Pp. 802–805.

3. Since Hill's argument that the admission into evidence of pages of his diary violated his Fifth Amendment rights was not raised below, it is not properly before this Court. Pp. 805–806.

69 Cal. 2d 550, 446 P. 2d 521, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., concurred in the result. HARLAN, J., filed a concurring and dissenting opinion, in which MARSHALL, J., joined, *post*, p. 806. DOUGLAS, J., took no part in the consideration or decision of this case.

Joseph Amato, appointed by the Court, 396 U. S. 999, reargued the cause for petitioner.

Ronald M. George, Deputy Attorney General of California, reargued the cause for respondent. With him on the brief were *Thomas C. Lynch*, Attorney General, and *William E. James*, Assistant Attorney General.

Keith C. Monroe filed a brief for the Orange County Criminal Courts Bar Association et al. as *amici curiae* urging reversal. *Duke W. Dunbar*, Attorney General, *pro se*, and *John P. Moore*, Deputy Attorney General, filed a brief for the Attorney General of Colorado et al. as *amici curiae*.

MR. JUSTICE WHITE delivered the opinion of the Court.

On June 4, 1966, four armed men robbed a residence in Studio City, California. On June 5, Alfred Baum and Richard Bader were arrested for possession of narcotics; at the time of their arrest, they were driving petitioner Hill's car, and a search of the car produced property stolen in the Studio City robbery the day before. Bader and Baum both admitted taking part in the June 4 robbery, and both implicated Hill. Bader told the police that he was sharing an apartment with Hill at 9311

Sepulveda Boulevard. He also stated that the guns used in the robbery and other stolen property were in the apartment. On June 6, Baum and Bader again told the police that Hill had been involved in the June 4 robbery.

One of the investigating officers then checked official records on Hill, verifying his prior association with Bader, his age and physical description, his address, and the make of his car. The information the officer uncovered corresponded with the general descriptions by the robbery victims and the statements made by Baum and Bader.

Hill concedes that this information gave the police probable cause to arrest him, and the police undertook to do so on June 6. Four officers went to the Sepulveda Boulevard apartment, verified the address, and knocked. One of the officers testified: "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader, answered the door. . . . We placed him under arrest for robbery."

The police had neither an arrest nor a search warrant. After arresting the man who answered the door, they asked him whether he was Hill and where the guns and stolen goods were. The arrestee replied that he was not Hill, that his name was Miller, that it was Hill's apartment and that he was waiting for Hill. He also claimed that he knew nothing about any stolen property or guns, although the police testified that an automatic pistol and a clip of ammunition were lying in plain view on a coffee table in the living room where the arrest took place. The arrestee then produced identification indicating that he was in fact Miller, but the police were unimpressed and proceeded to search the apartment—living room, bedroom, kitchen area, and bath—for a period which one officer described as "a couple of hours."

During the course of the search, the police seized sev-

eral items: rent receipts and personal correspondence bearing Hill's name from a dresser drawer in the bedroom; a starter pistol, two switchblade knives, a camera and case stolen in the Studio City robbery, and two hood-masks made from white T-shirts, all from the bedroom; a .22-caliber revolver from under the living room sofa; and two pages of petitioner Hill's diary from a bedroom dresser drawer.[1]

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[1] All of these items, except the rent receipts and correspondence, were later introduced in evidence at the preliminary examination involving Baum, Bader, and Hill. A radio stolen in the Studio City robbery was also introduced, since it was found in Hill's car when Baum and Bader were arrested. Finally, the State introduced two handwriting exemplars executed by petitioner Hill after his arrest. Although the rent receipts and personal correspondence were not introduced in evidence, one of the officers who participated in the arrest and search at the Hill apartment testified that in the same drawer where he found the diary pages "there were rent receipts, numerous stack of rent receipts at this particular apartment, made out to Archie Hill, and there were several other pieces of paper, correspondence, notes from girls, and so forth, all to an Archie or an Archie Hill." No objection was offered to this testimony.

Thereafter, petitioner's case was severed from that of Baum and Bader. Hill waived a jury and submitted the case for trial on the transcript of the preliminary hearing and the exhibits there introduced. The State called one additional witness at trial—Officer Gastaldo—who gave a more complete version of the investigation of the robbery and of the arrest of the man who turned out to be Miller. The two diary pages seized in Hill's apartment contained what was in effect a full confession of his participation in the Studio City robbery. The additional testimony of Officer Gastaldo was critical in establishing the legality of the arrest and subsequent search. After hearing this testimony, the trial judge denied petitioner's motion to suppress the items seized, including, of course, the diary pages. Hill presented no further evidence at trial, and was found guilty as charged. A motion for a new trial was subsequently denied, and petitioner's appeals in the California courts followed.

In his brief in this Court, petitioner attacks the admission of the diary pages on a ground never advanced below. For the reasons expressed in Part III of this opinion, we do not rule upon these contentions.

On October 20, 1966, Hill was found guilty of robbery on the basis of evidence produced at the preliminary hearing and the trial.[2] Eyewitnesses to the robbery were unable to identify Hill; the only substantial evidence of his guilt consisted of the items seized in the search of his apartment. In sustaining the admissibility of the evidence, the trial judge ruled that the arresting officers had acted in the good-faith belief that Miller was in fact Hill.[3] The District Court of Appeal agreed that the officers acted in good faith and that the arrest of Miller was valid but nonetheless thought the incident search of Hill's apartment unreasonable under the Fourth Amendment. 67 Cal. Rptr. 389 (1968).[4] The California Supreme Court in turn reversed, sustaining both the arrest and the search. 69 Cal. 2d 550, 446 P. 2d 521 (1968). We granted certiorari, 396 U. S. 818 (1969), and now affirm the judgment of the California Supreme Court.

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[2] See n. 1, *supra*.

[3] The trial judge stated:

"I have fully reviewed the evidence. I have determined that the officer in good faith believed that the defendant, or that the person who was arrested—not the defendant in this case—was believed by the officer in good faith to be Mr. Hill, and that whether or not this document consisting of two pages of the private diary of Mr. Hill should be admitted depends on whether or not at the time of the arrest and the search of the premises, the officer acted in good faith."

[4] Justice Ford stated:

"While the doctrine of probable cause assures a balance between the rights of the individual and those of the government with respect to the matter of arrest, the constitutional protection against unreasonable searches, particularly of a person's home, would be less than complete if a plenary search could be justified as incident to an arrest of a person mistakenly believed by an officer to be in immediate charge of the premises. Such a case is not one where the right of privacy must reasonably yield to the right of search." 67 Cal. Rptr., at 391.

I

Petitioner argues that *Chimel* v. *California*, 395 U. S. 752 (1969), decided after his conviction was affirmed by the California Supreme Court, should be applied to his case, which is before us on direct review. *Chimel* narrowed the permissible scope of searches incident to arrest, but in *Williams* v. *United States* and *Elkanich* v. *United States*, *ante*, p. 646, we held *Chimel* inapplicable to searches occurring before the date of decision in that case—regardless of whether a case was still on direct review when *Chimel* was decided, see *Williams*, *supra*, or whether a *Chimel* challenge was asserted in a subsequent collateral attack on a conviction. See *Elkanich*, *supra*. We also stated that in light of past decisions there was no difference in constitutional terms between state and federal prisoners insofar as retroactive application to their cases of a new interpretation of the Bill of Rights is concerned. *Ante*, at 656. The search of Hill's apartment, permissible in scope under pre-*Chimel* standards, will not be retrospectively invalidated because of that decision.

II

Based on our own examination of the record, we find no reason to disturb either the findings of the California courts that the police had probable cause to arrest Hill and that the arresting officers had a reasonable, good-faith belief that the arrestee Miller was in fact Hill, or the conclusion that "[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." 69 Cal. 2d, at 553, 446 P. 2d, at 523.[5] The police unquestionably had probable

[5] The California Supreme Court relied on *People* v. *Kitchens*, 46 Cal. 2d 260, 263–264, 294 P. 2d 17, 19–20 (1956); *People* v. *Miller*, 193 Cal. App. 2d 838, 14 Cal. Rptr. 704 (1961), and *People* v.

cause to arrest Hill; they also had his address and a verified description. The mailbox at the indicated address listed Hill as the occupant of the apartment. Upon gaining entry to the apartment, they were confronted with one who fit the description of Hill received from various sources.[6] That person claimed he was Miller, not Hill. But aliases and false identifications are not uncommon.[7] Moreover, there was a lock on the door and Miller's explanation for his mode of entry was not convincing.[8] He also denied knowledge of firearms in the apartment although a pistol and loaded ammunition clip were in plain view in the room.[9] The upshot was that the offi-

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Campos, 184 Cal. App. 2d 489, 7 Cal. Rptr. 513 (1960). See also *People* v. *Lopez*, 269 Cal. App. 2d 461, 468 n. 2, 74 Cal. Rptr. 740, 744 n. 2 (1969) (dictum).

[6] At the preliminary hearing and trial, the only disparities in description established were that Miller was two inches taller and 10 pounds heavier than Hill.

[7] In denying the motion to suppress, the trial judge took judicial notice of the fact "that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification."

[8] Petitioner points out that the officers had no idea how Miller gained access to the Hill apartment, and asserts that it was improper for them to assume that he was lawfully there. It is undisputed that Miller was the only occupant of the apartment. One of the officers testified that there was a lock on the door and that he had asked Miller how he had gotten into the apartment; Miller made no specific reply, except to reiterate that he had come in and was waiting for Hill, the tenant.

[9] Petitioner also claims that it was unreasonable for the officers to disregard Miller's proffered identification. However, Miller's answer to the question about firearms could reasonably be regarded as evasive, and his subsequent production of identification as therefore entitled to little weight. Petitioner stresses that Miller was subsequently booked in his own name when taken to the station house, arguing that this demonstrates that the officers' belief that Miller was Hill was unreasonable. However, the trial judge found that the arresting officer was not responsible for the booking pro-

cers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Nor can we agree with petitioner that however valid the arrest of Miller, the subsequent search violated the Fourth Amendment. It is true that Miller was not Hill; nor did Miller have authority or control over the premises, although at the very least he was Hill's guest. But the question is not what evidence would have been admissible against Hill (or against Miller for that matter) if the police, with probable cause to arrest Miller, had arrested him in Hill's apartment and then carried out the search at issue. Here there was probable cause to arrest Hill and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill. In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not

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cedures under which Miller would be booked under whatever name he gave at the station house. This conclusion is buttressed by the fact that Miller was not released from custody for a day and a half, after a thorough check of his identification revealed that he had in fact told the truth about his identity, despite his evasiveness in dealing with the officers at the apartment.

legal technicians, act," *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949), the arrest and subsequent search were reasonable and valid under the Fourth Amendment.

III

Finally, in his brief in this Court, petitioner argues that the admission in evidence of the two pages of his diary—pages which contained what amounted to a confession of the robbery—violated the Fifth Amendment under *Boyd* v. *United States*, 116 U. S. 616 (1886). Counsel for Hill conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed, or argued in the California appellate courts.[10] The petition for certiorari likewise ignored it. In this posture of the case, the question, although briefed and argued here, is not properly before us. In *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), certiorari was granted to consider the constitutionality of a Louisiana statute, but at oral argument it developed that the federal question had never been raised, preserved, or passed upon in the state courts. Relying on a long line of cases, we dismissed the writ for want of jurisdiction. 394 U. S., at 439. In addition, we stated that there were sound policy reasons for adhering to such a rule. In the context of that case, we indicated the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes. We also indicated that a federal habeas corpus remedy might remain if no state procedure for raising the issue was available following dismissal of the writ. These considerations are no less applicable in this

[10] Tr. of Oral Rearg. 34–35.

case. We therefore do not reach the Fifth Amendment question and affirm the judgment of the Supreme Court of California.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE DOUGLAS took no part in the consideration or the decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree with the Court's opinion except for its conclusion that the *Chimel* case is not to be applied to this one.

Two Terms ago, in *Chimel* v. *California*, 395 U. S. 752 (1969), we held that a search without a warrant, but incident to a lawful arrest, must be narrowly confined in scope if it is to pass constitutional muster. In such circumstances, we said:

> "There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
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> "There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less." 395 U. S., at 763 (footnote omitted).

The search here involved, fully described in the Court's opinion, plainly exceeded the bounds set forth in *Chimel*. The State contends that the search here was consistent with *Chimel* because conducted in the evening when it was not possible to obtain a search warrant. Whatever validity such a limiting principle might have in other contexts, it certainly cannot properly be invoked here. Baum and Bader had implicated Hill at least 24 hours prior to the search of Hill's apartment. Moreover, the State does not explain why it would not have been possible to observe the apartment after the mistaken arrest of Miller as Hill and then test before a magistrate the validity of their belief that they had probable cause for the issuance of a warrant authorizing a complete search of the apartment.

Because I believe this case reveals an obvious violation of *Chimel* and because I consider we are duty bound to apply the principles there enunciated to cases, like this one, before us on direct review, see my separate opinion in *Mackey* v. *United States* (and companion cases), *ante*, p. 675, decided today, I am compelled to cast my vote for reversal of the judgment of the Supreme Court of California.

REWIS ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 5342. Argued January 19, 1971—
Decided April 5, 1971

Petitioners conducted a lottery operation in Florida, near the Georgia border. They were convicted along with two Georgia residents who placed bets at petitioners' establishment, of violating 18 U. S. C. § 1952, the Travel Act, which prohibits interstate travel with the intent to "promote, manage, establish, carry on, or facilitate" certain illegal activity. The District Court instructed the jury that if the Georgia bettors traveled to Florida for the purpose of gambling, they violated the Act, and that a defendant could be found guilty under the aiding and abetting statute, 18 U. S. C. § 2, without proof that he had personally performed every act constituting the charged offense. The Court of Appeals reversed the convictions of the Georgia bettors, holding that § 1952 did not make it a federal crime merely to cross a state line to place a bet, but upheld petitioners' convictions on the ground that gambling establishment operators are responsible for the interstate travel of their customers. *Held:* Conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of the Travel Act. Pp. 811–814.

418 F. 2d 1218, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all members joined except WHITE, J., who took no part in the decision of the case.

Albert J. Datz argued the cause and filed briefs for petitioners.

Sidney M. Glazer argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Michael G. Kelly.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case, petitioners challenge their convictions under the Travel Act, 18 U. S. C. § 1952, which prohibits interstate travel in furtherance of certain criminal activity.[1] Although the United States Court of Appeals for the Fifth Circuit narrowed an expansive interpretation of the Act, the Court of Appeals affirmed petitioners' convictions. For the reasons stated below, we reverse.

Petitioners, James Rewis and Mary Lee Williams, were convicted along with two other defendants in the United States District Court for the Middle District of Florida.[2]

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[1] Title 18 U. S. C. § 1952 (1964 ed. and Supp. V) provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

[2] Petitioners were convicted of eight substantive violations under § 1952 and of conspiracy to violate the section. Petitioner Rewis was sentenced to five years' imprisonment on each count, to run concurrently. Petitioner Williams was sentenced to three years' imprisonment on each count, to run concurrently, subject to parole under 18 U. S. C. § 4208 (a) (2). Petitioner Rewis was also convicted of two counts of having failed to purchase a wagering tax

Their convictions arose from a lottery, or numbers operation, which petitioners admittedly ran in Yulee, Florida, a small community located a few miles south of the Georgia-Florida state line. Petitioners are Florida residents, and there is no evidence that they at any time crossed state lines in connection with the operation of their lottery. The other two convicted defendants are Georgia residents who traveled from their Georgia homes to place bets at petitioners' establishment in Yulee.

The District Court instructed the jury that mere bettors in a lottery violated Florida law, and that if the bettors traveled interstate for the purpose of gambling, they also violated the Travel Act. Presumably referring to petitioners, the District Court further charged that a defendant could be found guilty under the aiding and abetting statute, 18 U. S. C. § 2,[3] without proof that he personally performed every act constituting the charged offense. On appeal, the Fifth Circuit held that § 1952 did not make it a federal crime merely to cross a state line for the purpose of placing a bet and reversed the convictions of the two Georgia residents because the evidence presented at trial was insufficient to show that they were anything other than customers of the gambling operation.[4] However, the Court of Appeals upheld peti-

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stamp. These latter two convictions were reversed by the Court of Appeals under the intervening decisions of this Court in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968).

[3] 18 U. S. C. § 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[4] 418 F. 2d 1218. The Government has not sought review of that part of the Court of Appeals decision reversing the conviction of the two Georgia residents.

tioners' convictions on the ground that operators of gambling establishments are responsible for the interstate travel of their customers. 418 F. 2d 1218, 1222.

We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act.[5] But we are unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952 prohibits interstate travel with the intent to "promote, manage, establish, carry on, or facilitate" certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.[6] In addition, we are struck by what Congress

[5] Both parties correctly concede that the questions in this case are solely statutory. No issue of constitutional dimension is presented.

[6] Incorporated in the Senate report (S. Rep. No. 644, 87th Cong., 1st Sess., 2–3, dated July 27, 1961) the following appears:

"The bill, S. 1653, was introduced by the chairman of the committee, Senator James O. Eastland, on April 18, 1961, on the recommendation of the Attorney General, Robert F. Kennedy, as a part of the Attorney General's legislative program to combat organized crime and racketeering.

"The Attorney General testified before the committee in support of the bill, S. 1653, on June 6, 1961, and commented:

" 'We are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.

" 'Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. . . .

" 'The target clearly is organized crime. The travel that would

did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of § 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 349 U. S. 81, 83 (1955).

The Government concedes as much, but offers an alternative construction of the Travel Act—that the Act is violated whenever the operator of an illegal establish-

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be banned is travel "in furtherance of a business enterprise" which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.'

. . . . .

" 'Our investigations also have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials.' "

ment can reasonably foresee that customers will cross state lines for the purpose of patronizing the illegal operation or whenever the operator actively seeks to attract business from another State. The first half of this proposed interpretation—reasonable foreseeability of interstate patronage—does not merit acceptance. Whenever individuals actually cross state lines for the purpose of patronizing a criminal establishment, it will almost always be reasonable to say that the operators of the establishment could have foreseen that some of their customers would come from out of State. So, for practical purposes, this alternative construction is almost as expansive as interpretations that we have already rejected. In addition, there is little, if any, evidence that Congress intended that foreseeability should govern criminal liability under § 1952.

There may, however, be greater support for the second half of the Government's proposed interpretation—that active encouragement of interstate patronage violates the Act. Of course, the conduct deemed to constitute active encouragement must be more than merely conducting the illegal operation; otherwise, this interpretation would only restate other constructions which we have rejected. Still, there are cases in which federal courts have correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity, see, *e. g.*, *United States* v. *Chambers*, 382 F. 2d 910, 913–914 (CA6 1967); *United States* v. *Barrow*, 363 F. 2d 62, 64–65 (CA3 1966), cert. denied, 385 U. S. 1001 (1967); *United States* v. *Zizzo*, 338 F. 2d 577, 580 (CA7 1964), cert. denied, 381 U. S. 915 (1965), and the Government argues that the principles of those decisions should be extended to cover persons who actively seek interstate patronage. Although we are cited to no cases that have gone so far and although much of what we have said casts substantial doubt on the Government's

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broad argument, there may be occasional situations in which the conduct encouraging interstate patronage so closely approximates the conduct of a principal in a criminal agency relationship that the Travel Act is violated. But we need not rule on this part of the Government's theory because it is not the interpretation of § 1952 under which petitioners were convicted. The jury was not charged that it must find that petitioners actively sought interstate patronage. And we are not informed of any action by petitioners, other than actually conducting their lottery, that was designed to attract out-of-state customers. As a result, the Government's proposed interpretation of the Travel Act cannot be employed to uphold these convictions.

Reversed.

MR. JUSTICE WHITE took no part in the decision of this case.

Syllabus

ROGERS, SECRETARY OF STATE *v.* BELLEI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 24. Argued January 15, 1970—Reargued November 12, 1970—Decided April 5, 1971

Appellee challenges the constitutionality of § 301 (b) of the Immigration and Nationality Act of 1952, which provides that one who acquires United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, who has met certain residence requirements, shall lose his citizenship unless he resides in this country continuously for five years between the ages of 14 and 28. The three-judge District Court held the section unconstitutional, citing *Afroyim* v. *Rusk*, 387 U. S. 253, and *Schneider* v. *Rusk*, 377 U. S. 163. *Held:* Congress has the power to impose the condition subsequent of residence in this country on appellee, who does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States," and its imposition is not unreasonable, arbitrary, or unlawful. *Afroyim* v. *Rusk*, *supra*, and *Schneider* v. *Rusk*, *supra*, distinguished. Pp. 820–836.

296 F. Supp. 1247, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and WHITE, JJ., joined. BLACK, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 836. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 845.

Solicitor General Griswold argued the cause for appellant on the reargument. With him on the brief were *Assistant Attorney General Wilson* and *Charles Gordon*. *Joseph J. Connolly* argued the cause for appellant on the original argument.

O. John Rogge reargued the cause and filed a brief for appellee.

Richard N. Gardner argued the cause on the reargument for the Association of American Wives of Europeans

et al. as *amici curiae* urging affirmance. With him on the brief were *Alexis C. Coudert, Eugene L. Girden, Joseph H. Gordon, David M. Gooder,* and *Arlene Tuck Ulman.*

James Sinclair, *pro se,* filed a brief as *amicus curiae* urging reversal.

Donald L. Ungar filed a brief for Vicente Gonzalez-Gomez as *amicus curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Under constitutional challenge here, primarily on Fifth Amendment due process grounds, but also on Fourteenth Amendment grounds, is § 301 (b) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 236, 8 U. S. C. § 1401 (b).

Section 301 (a) of the Act, 8 U. S. C. § 1401 (a), defines those persons who "shall be nationals and citizens of the United States at birth." Paragraph (7) of § 301 (a) includes in that definition a person born abroad "of parents one of whom is an alien, and the other a citizen of the United States" who has met specified conditions of residence in this country. Section 301 (b), however, provides that one who is a citizen at birth under § 301 (a)(7) shall lose his citizenship unless, after age 14 and before age 28, he shall come to the United States and be physically present here continuously for at least five years. We quote the statute in the margin.[1]

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[1] "SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:

"(1) a person born in the United States, and subject to the jurisdiction thereof;

. . . . . .

"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to

The plan thus adopted by Congress with respect to a person of this classification was to bestow citizenship at birth but to take it away upon the person's failure to comply with a post-age-14 and pre-age-28 residential requirement. It is this deprival of citizenship, once bestowed, that is under attack here.

I

The facts are stipulated:

1. The appellee, Aldo Mario Bellei (hereinafter the plaintiff), was born in Italy on December 22, 1939. He is now 31 years of age.

2. The plaintiff's father has always been a citizen of Italy and never has acquired United States citizenship. The plaintiff's mother, however, was born in Philadelphia in 1915 and thus was a native-born United States citizen. She has retained that citizenship. Moreover, she has fulfilled the requirement of § 301 (a)(7) for physical pres-

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the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided* . . . .

"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

"(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934 . . . ."

Section 301 (a)(7) was amended November 6, 1966, by Pub. L. 89–770, 80 Stat. 1322, by way of additions to the proviso, omitted above; these have no relevancy here. Pub. L. 85–316, § 16, 71 Stat. 644, 8 U. S. C. § 1401b, enacted in September 1957, provides that absences of less than 12 months in the aggregate "shall not be considered to break the continuity of [the] physical presence" required by § 301 (b).

ence in the United States for 10 years, more than five of which were after she attained the age of 14 years. The mother and father were married in Philadelphia on the mother's 24th birthday, March 14, 1939. Nine days later, on March 23, the newlyweds departed for Italy. They have resided there ever since.

3. By Italian law the plaintiff acquired Italian citizenship upon his birth in Italy. He retains that citizenship. He also acquired United States citizenship at his birth under Rev. Stat. § 1993, as amended by the Act of May 24, 1934, § 1, 48 Stat. 797, then in effect.[2] That version of the statute, as does the present one, contained a residence condition applicable to a child born abroad with one alien parent.

4. The plaintiff resided in Italy from the time of his birth until recently. He currently resides in England, where he has employment as an electronics engineer with an organization engaged in the NATO defense program.

5. The plaintiff has come to the United States five different times. He was physically present here during the following periods:

April 27 to July 31, 1948
July 10 to October 5, 1951
June to October 1955

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[2] "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

December 18, 1962 to February 13, 1963
May 26 to June 13, 1965.

On the first two occasions, when the plaintiff was a boy of eight and 11, he entered the country with his mother on her United States passport. On the next two occasions, when he was 15 and just under 23, he entered on his own United States passport and was admitted as a citizen of this country. His passport was first issued on June 27, 1952. His last application approval, in August 1961, contains the notation "Warned abt. 301 (b)." The plaintiff's United States passport was periodically approved to and including December 22, 1962, his 23d birthday.

6. On his fifth visit to the United States, in 1965, the plaintiff entered with an Italian passport and as an alien visitor. He had just been married and he came with his bride to visit his maternal grandparents.

7. The plaintiff was warned in writing by United States authorities of the impact of § 301 (b) when he was in this country in January 1963 and again in November of that year when he was in Italy. Sometime after February 11, 1964, he was orally advised by the American Embassy at Rome that he had lost his United States citizenship pursuant to § 301 (b). In November 1966 he was so notified in writing by the American Consul in Rome when the plaintiff requested another American passport.

8. On March 28, 1960, plaintiff registered under the United States Selective Service laws with the American Consul in Rome. At that time he already was 20 years of age. He took in Italy, and passed, a United States Army physical examination. On December 11, 1963, he was asked to report for induction in the District of Columbia. This induction, however, was then deferred because of his NATO defense program employment. At the time of deferment he was warned of the danger of losing his United States citizenship if he did not comply

with the residence requirement. After February 14, 1964, Selective Service advised him by letter that, due to the loss of his citizenship, he had no further obligation for United States military service.

Plaintiff thus concededly failed to comply with the conditions imposed by § 301 (b) of the Act.

II

The plaintiff instituted the present action against the Secretary of State in the Southern District of New York. He asked that the Secretary be enjoined from carrying out and enforcing § 301 (b), and also requested a declaratory judgment that § 301 (b) is unconstitutional as violative of the Fifth Amendment's Due Process Clause, the Eighth Amendment's Punishment Clause, and the Ninth Amendment, and that he is and always has been a native-born United States citizen. Because, under 28 U. S. C. § 1391 (e), the New York venue was improper, the case was transferred to the District of Columbia. 28 U. S. C. § 1406 (a).

A three-judge District Court was convened. With the facts stipulated, cross motions for summary judgment were filed. The District Court ruled that § 301 (b) was unconstitutional, citing *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), and *Schneider* v. *Rusk*, 377 U. S. 163 (1964), and sustained the plaintiff's summary judgment motion. *Bellei* v. *Rusk*, 296 F. Supp. 1247 (DC 1969). This Court noted probable jurisdiction, 396 U. S. 811 (1969), and, after argument at the 1969 Term, restored the case to the calendar for reargument. 397 U. S. 1060 (1970).

III

The two cases primarily relied upon by the three-judge District Court are, of course, of particular significance here.

Schneider v. *Rusk*, 377 U. S. 163 (1964). Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's naturalization in the United States. She came to this country as a small child with her parents and remained here until she finished college. She then went abroad for graduate work, was engaged to a German national, married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, a passport was denied by the State Department on the ground that she had lost her United States citizenship under the specific provisions of § 352 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1484 (a)(1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens.

The dissent (Mr. Justice Clark, joined by JUSTICES HARLAN and WHITE) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

Afroyim v. *Rusk*, 387 U. S. 253 (1967). Mr. Afroyim, a Polish national by birth, immigrated to the United States at age 19 and after 14 years here acquired United States citizenship by naturalization. Twenty-four years later he went to Israel and voted in a political election there. In 1960 a passport was denied him by the State Department on the ground that he had lost his United States citizenship under the specific provisions of § 349 (a)(5) of the Act, 8 U. S. C. § 1481 (a)(5), by

his foreign voting. The Court, by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general power, express or implied, to take away an American citizen's citizenship without his assent," 387 U. S., at 257; that Congress' power is to provide a uniform rule of naturalization and, when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well-known but not uncontroversial dictum in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827 (1824); and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure" and "to put citizenship beyond the power of any governmental unit to destroy," 387 U. S., at 263. *Perez* v. *Brownell*, 356 U. S. 44 (1958), a five-to-four holding within the decade and precisely to the opposite effect, was overruled.

The dissent (MR. JUSTICE HARLAN, joined by JUSTICES Clark, STEWART, and WHITE) took issue with the Court's claim of support in the legislative history, would elucidate the Marshall dictum, and observed that the adoption of the Fourteenth Amendment did not deprive Congress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. 387 U. S., at 292.

It is to be observed that both Mrs. Schneider and Mr. Afroyim had resided in this country for years. Each had acquired United States citizenship here by the naturalization process (in one case derivative and in the other direct) prescribed by the National Legislature. Each, in short, was covered explicitly by the Fourteenth Amendment's very first sentence: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This, of course, ac-

counts for the Court's emphasis in *Afroyim* upon "Fourteenth Amendment citizenship." 387 U. S., at 262.

IV

The statutes culminating in § 301 merit review:

1. The very first Congress, at its Second Session, proceeded to implement its power, under the Constitution's Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization" by producing the Act of March 26, 1790, 1 Stat. 103. That statute, among other things, stated, "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . ."

2. A like provision, with only minor changes in phrasing and with the same emphasis on paternal residence, was continuously in effect through three succeeding naturalization Acts. Act of January 29, 1795, § 3, 1 Stat. 415; Act of April 14, 1802, § 4, 2 Stat. 155; Act of February 10, 1855, c. 71, § 1, 10 Stat. 604. The only significant difference is that the 1790, 1795, and 1802 Acts read retrospectively, while the 1855 Act reads prospectively as well. See *Weedin* v. *Chin Bow,* 274 U. S. 657, 664 (1927), and *Montana* v. *Kennedy,* 366 U. S. 308, 311 (1961).

3. Section 1 of the 1855 Act, with changes unimportant here, was embodied as § 1993 of the Revised Statutes of 1874.[3]

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[3] "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

4. The Act of March 2, 1907, § 6, 34 Stat. 1229, provided that all children born abroad who were citizens under Rev. Stat. § 1993 and who continued to reside elsewhere, in order to receive governmental protection, were to record at age 18 their intention to become residents and remain citizens of the United States and were to take the oath of allegiance upon attaining their majority.[4]

5. The change in § 1993 effected by the Act of May 24, 1934, is reflected in n. 2, *supra*. This eliminated the theretofore imposed restriction to the paternal parent and prospectively granted citizenship, subject to a five-year continuous residence requirement and an oath, to the foreign-born child of either a citizen father or a citizen mother. This was the form of the statute at the time of plaintiff's birth on December 22, 1939.

6. The Nationality Act of 1940, § 201, 54 Stat. 1138, contained a similar condition directed to a total of five years' residence in the United States between the ages of 13 and 21.[5]

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[4] "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

[5] SEC. 201. The following shall be nationals and citizens of the United States at birth:

. . . . . .

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years,

7. The Immigration and Nationality Act, by its § 407, 66 Stat. 281, became law in December 1952. Its § 301 (b) contains a five years' continuous residence condition (alleviated, with the 1957 amendment, see n. 1, by an allowance for absences less than 12 months in the aggregate) directed to the period between 14 and 28 years of age.

The statutory pattern, therefore, developed and expanded from (a) one, established in 1790 and enduring through the Revised Statutes and until 1934, where citizenship was specifically denied to the child born abroad of a father who never resided in the United States; to (b), in 1907, a governmental protection condition for the child born of an American citizen father and residing abroad, dependent upon a declaration of intent and the oath of allegiance at majority; to (c), in 1934, a condition, for the child born abroad of one United States citizen parent and one alien parent, of five years' continuous residence in the United States before age 18 and the oath of allegiance within six months after majority; to (d), in 1940, a condition, for that child, of five years' residence here, not necessarily continuous, between ages 13 and 21; to (e), in 1952, a condition,

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the other being an alien: *Provided,* That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

. . . . . .

"(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934."

for that child, of five years' continuous residence here, with allowance, between ages 14 and 28.

The application of these respective statutes to a person in plaintiff Bellei's position produces the following results:

1. Not until 1934 would that person have had any conceivable claim to United States citizenship. For more than a century and a half no statute was of assistance. Maternal citizenship afforded no benefit. One may observe, too, that if Mr. Bellei had been born in 1933, instead of in 1939, he would have no claim even today. *Montana* v. *Kennedy, supra.*

2. Despite the recognition of the maternal root by the 1934 amendment, in effect at the time of plaintiff's birth, and despite the continuing liberalization of the succeeding statutes, the plaintiff still would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did fulfill the residential condition imposed for him by any of the statutes.

3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See nn. 5 and 1, *supra.*

Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plain-

tiff nevertheless failed to satisfy any form of the condition.

V

It is evident that Congress felt itself possessed of the power to grant citizenship to the foreign born and at the same time to impose qualifications and conditions for that citizenship. Of course, Congress obviously felt that way, too, about the two expatriation provisions invalidated by the decisions in *Schneider* and *Afroyim*.

We look again, then, at the Constitution and further indulge in history's assistance:

Of initial significance, because of its being the foundation stone of the Court's decisional structure in *Afroyim*, and, perhaps by a process of after-the-fact osmosis, of the earlier *Schneider* as well, is the Fourteenth Amendment's opening sentence:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here.

The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence.

The reach of congressional power in this area is readily apparent:

1. Over 70 years ago the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who were British subjects. *United States* v. *Wong Kim Ark,* 169 U. S. 649, 668–671 (1898). The Court concluded that "naturalization by descent" was not a common-law concept but was dependent, instead, upon statutory enactment. The statutes examined were 25 Edw. 3, Stat. 2 (1350); 29 Car. 2, c. 6 (1677); 7 Anne, c. 5, § 3 (1708); 4 Geo. 2, c. 21 (1731); and 13 Geo. 3, c. 21 (1773). Later Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray" and observed "that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute . . . ." *Weedin* v. *Chin Bow,* 274 U. S., at 660. He referred to the cited English statutes and stated, "These statutes applied to the colonies before the War of Independence."

We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli,* that is, that the place of birth governs citizenship status except as modified by statute.

2. The Constitution as originally adopted contained no definition of United States citizenship. However, it referred to citizenship in general terms and in varying contexts: Art. I, § 2, cl. 2, qualifications for members of the House; Art. I, § 3, cl. 3, qualifications for Senators;

Art. II, § 1, cl. 5, eligibility for the office of President; Art. III, § 2, cl. 1, citizenship as affecting judicial power of the United States. And, as has been noted, Art. I, § 8, cl. 4, vested Congress with the power to "establish an uniform Rule of Naturalization." The historical reviews in the *Afroyim* opinions provide an intimation that the Constitution's lack of definitional specificity may well have been attributable in part to the desire to avoid entanglement in the then-existing controversy between concepts of state and national citizenship and with the difficult question of the status of Negro slaves.

In any event, although one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document or, indeed, in any of the amendments adopted prior to the War Between the States.

3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Art. II, § 1, cl. 5, we have, in the Civil Rights Act of April 9, 1866, 14 Stat. 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native born: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ." This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868, with expansion to "[a]ll persons born or naturalized in the United States . . . ." As has been noted above, the amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure" and not subject to change by mere statute. *Afroyim* v. *Rusk*, 387 U. S., at 263. See H. Flack, Adoption of the Fourteenth Amendment 88–94 (1908).

Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of exist-

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ing rights, and affirmative of existing law," so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States* v. *Wong Kim Ark,* 169 U. S., at 688. Then follows a most significant sentence:

> "But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization."

Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

4. The Court has recognized the existence of this power. It has observed, "No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States* v. *Ginsberg,* 243 U. S. 472, 475 (1917). See *United States* v. *Ness,* 245 U. S. 319 (1917); *Maney* v. *United States,* 278 U. S. 17 (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent. As hereinabove noted, persons born abroad, even of United States citizen fathers who, however, acquired American citizenship after the effective date of the 1802 Act, were aliens. Congress

responded to that situation only by enacting the 1855 statute. *Montana* v. *Kennedy,* 366 U. S., at 311. But more than 50 years had expired during which, because of the withholding of that benefit by Congress, citizenship by such descent was not bestowed. *United States* v. *Wong Kim Ark,* 169 U. S., at 673–674. Then, too, the Court has recognized that until the 1934 Act the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father. *Montana* v. *Kennedy, supra.*

Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei [6] and may prescribe a period of residence in the United States as a condition *precedent* without constitutional question.[7]

Thus we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

VI

This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge.

1. The Congress has an appropriate concern with problems attendant on dual nationality. *Savorgnan* v.

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[6] At oral argument plaintiff's counsel conceded that "Congress need not vest a person in his position with citizenship if it chooses not to do so." Tr. of Oral Rearg. 27. Counsel for the *amici* sympathetic with the plaintiff's cause made a like concession. *Id.,* at 36.

[7] *Id.,* at 26.

United States, 338 U. S. 491, 500 (1950); N. Bar-Yaacov, Dual Nationality xi and 4 (1961). These problems are particularly acute when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality. The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary.

The duality also creates problems for the governments involved. MR. JUSTICE BRENNAN recognized this when, concurring in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 187 (1963), a case concerning native-born citizens, he observed: "We have recognized the entanglements which may stem from dual allegiance . . . ." In a famous case MR. JUSTICE DOUGLAS wrote of the problem of dual citizenship. *Kawakita* v. *United States*, 343 U. S. 717, 723–736 (1952). He noted that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting," *id.*, at 733; that one with dual nationality cannot turn that status "into a fair-weather citizenship," *id.*, at 736; and that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship," *ibid.* The District Court in this very case conceded:

> "It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States." 296 F. Supp., at 1252.

2. There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In *Perkins* v. *Elg*, 307 U. S. 325, 329 (1939), the Court observed that a native-born citizen

who had acquired dual nationality during minority through his parents' foreign naturalization abroad did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties." In *Kawakita* v. *United States*, 343 U. S., at 734, the Court noted that a dual national "under certain circumstances" can be deprived of his American citizenship through an Act of Congress. In *Mandoli* v. *Acheson*, 344 U. S. 133, 138 (1952), the Court took pains to observe that there was no statute in existence imposing an election upon that dual nationality litigant.

These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate, however, that this is possible, and in *Mandoli* the holding was based on the very absence of a statute and not on any theory of unconstitutionality. And all three of these cases concerned persons who were born here, that is, persons who possessed Fourteenth Amendment citizenship; they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.

3. The statutory development outlined in Part IV above, by itself and without reference to the underlying legislative history, committee reports, and other studies, reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful and not accidental. It was legislation structured with care and in the light of then apparent problems.

4. The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair. Congress first has imposed

a condition precedent in that the citizen parent must have been in the United States or its possessions not less than 10 years, at least five of which are after attaining age 14. It then has imposed, as to the foreign-born child himself, the condition subsequent as to residence here. The Court already had emphasized the importance of residence in this country as the talisman of dedicated attachment, *Weedin* v. *Chin Bow*, 274 U. S., at 666–667, and said:

> "It is not too much to say, therefore, that Congress at that time [when Rev. Stat. § 1993 was under consideration] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, 'the heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship.' Foreign Relations of the United States, Pt. 1, 1873, p. 259." 274 U. S., at 665–666.

The same policy is reflected in the required period of residence here for aliens seeking naturalization. 8 U. S. C. § 1427 (a).

5. We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all, on the asserted "premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," *Schneider*

v. *Rusk*, 377 U. S., at 165, and on the announcement that Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *Afroyim* v. *Rusk*, 387 U. S., at 257. But, as pointed out above, these were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to "persons born or naturalized in the United States." We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside. *Afroyim* v. *Rusk*, 387 U. S., at 267 n. 23.

6. A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious.

7. Neither are we persuaded that a condition subsequent in this area impresses one with "second-class citizenship." That cliché is too handy and too easy, and, like most clichés, can be misleading. That the condition subsequent may be beneficial is apparent in the light

of the conceded fact that citizenship to this plaintiff was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not "second-class."

8. The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision of the statute and of his need to take up residence in the United States prior to his 23d birthday.

We hold that § 301 (b) has no constitutional infirmity in its application to plaintiff Bellei. The judgment of the District Court is reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Less than four years ago this Court held that

> "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." *Afroyim* v. *Rusk*, 387 U. S. 253, 268 (1967).

The holding was clear. Congress could not, until today, consistently with the Fourteenth Amendment enact a

law stripping an American of his citizenship which he has never voluntarily renounced or given up. Now this Court, by a vote of five to four through a simple change in its composition, overrules that decision.

The Court today holds that Congress can indeed rob a citizen of his citizenship just so long as five members of this Court can satisfy themselves that the congressional action was not "unreasonable, arbitrary," *ante*, at 831; "misplaced or arbitrary," *ante*, at 832; or "irrational or arbitrary or unfair," *ante*, at 833. My first comment is that not one of these "tests" appears in the Constitution. Moreover, it seems a little strange to find such "tests" as these announced in an opinion which condemns the earlier decisions it overrules for their resort to clichés, which it describes as "too handy and too easy, and, like most clichés, can be misleading." *Ante*, at 835. That description precisely fits those words and clauses which the majority uses, but which the Constitution does not.

The Constitution, written for the ages, cannot rise and fall with this Court's passing notions of what is "fair," or "reasonable," or "arbitrary." The Fourteenth Amendment commands:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Speaking of this very language, the Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court. I dissent.

Bellei became an American citizen under the terms of

§ 1993 of the Revised Statutes, as amended,[1] and he has neither renounced his American citizenship nor voluntarily assented to any governmental act terminating it. He has never given any indication of wanting to expatriate himself but, rather, has consistently maintained that he wants to keep his American citizenship. In my view, the decision in *Afroyim*, therefore, requires the Court to hold here that Bellei has been unconstitutionally deprived by § 301 (b) of the Immigration and Nationality Act of 1952[2] of his right to be an American citizen. Since § 301 (b) does not take into account in any way whether the citizen intends or desires to relinquish his citizenship, that section is inevitably inconsistent with the constitutional principles declared in *Afroyim*.

The Court today holds that the Citizenship Clause of the Fourteenth Amendment has no application to Bellei. The Court first notes that *Afroyim* was essentially a case construing the Citizenship Clause of the Fourteenth Amendment. Since the Citizenship Clause declares that: "All persons born or naturalized in the United States . . . are citizens of the United States . . . ," the Court reasons that the protections against involuntary expatriation declared in *Afroyim* do not protect *all* American citizens, but only those "born or naturalized in the United States." Afroyim, the argument runs, was naturalized in this country so he was protected by the Citizenship Clause, but Bellei, since he acquired his American citizenship at birth in Italy as a foreign-born child of an American citizen, was neither born nor naturalized in the United States and, hence, falls outside the scope of the Fourteenth Amendment guarantees declared in *Afroyim*. One could hardly call this a generous reading of the

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[1] Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797.

[2] 8 U. S. C. § 1401 (b).

great purposes the Fourteenth Amendment was adopted to bring about.

While conceding that Bellei is an American citizen, the majority states: "He simply is not a Fourteenth-Amendment-first-sentence citizen." Therefore, the majority reasons, the congressional revocation of his citizenship is not barred by the Constitution. I cannot accept the Court's conclusion that the Fourteenth Amendment protects the citizenship of some Americans and not others.

Indeed, the concept of a hierarchy of citizenship, suggested by the majority opinion, was flatly rejected in *Schneider* v. *Rusk*, 377 U. S. 163 (1964): "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Id.*, at 165. The Court there held that Congress could not deprive Mrs. Schneider of her citizenship, which she, like Mr. Bellei in the present case, acquired derivatively through her citizen mother. Consequently, the majority in its rush to overrule *Afroyim* must also, in effect, overrule *Schneider* as well.

Under the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress. The Court rejected such narrow, restrictive, and super-technical interpretations of the Citizenship Clause when it held in *Afroyim* that that Clause "was designed to, and does, protect every citizen of this Nation . . . ." 387 U. S., at 268.

Afroyim's broad interpretation of the scope of the Citizenship Clause finds ample support in the language and history of the Fourteenth Amendment. Bellei was not "born . . . in the United States," but he was, constitutionally speaking, "naturalized in the United States." Although those Americans who acquire their citizenship

under statutes conferring citizenship on the foreign-born children of citizens are not popularly thought of as naturalized citizens, the use of the word "naturalize" in this way has a considerable constitutional history. Congress is empowered by the Constitution to "establish an uniform Rule of Naturalization," Art. I, § 8. Anyone acquiring citizenship solely under the exercise of this power is, constitutionally speaking, a naturalized citizen. The first congressional exercise of this power, entitled "An Act to establish an uniform Rule of Naturalization," was passed in 1790 at the Second Session of the First Congress. It provided in part:

> "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." 1 Stat. 103, 104.

This provision is the earliest form of the statute under which Bellei acquired his citizenship. Its enactment as part of a "Rule of Naturalization" shows, I think, that the First Congress conceived of this and most likely all other purely statutory grants of citizenship as forms or varieties of naturalization. However, the clearest expression of the idea that Bellei and others similarly situated should for constitutional purposes be considered as naturalized citizens is to be found in *United States* v. *Wong Kim Ark,* 169 U. S. 649 (1898):

> "The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere

> fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." 169 U. S., at 702–703.

The Court in *Wong Kim Ark* thus stated a broad and comprehensive definition of naturalization. As shown in *Wong Kim Ark*, naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization. This inclusive definition has been adopted in several opinions of this Court besides *United States* v. *Wong Kim Ark, supra.* Thus in *Minor* v. *Happersett*, 21 Wall. 162, 167 (1875), the Court said: "Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. . . . [N]ew citizens may be born or they may be created by naturalization." And in *Elk* v. *Wilkins*, 112 U. S. 94 (1884), the Court took the position that the Fourteenth Amendment

> "contemplates two sources of citizenship, and two sources only: birth and naturalization. . . . Per-

> sons not . . . subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired." 112 U. S., at 101–102.

Moreover, this concept of naturalization is the only one permitted by this Court's consistent adoption of the view that the Fourteenth Amendment was intended to supply a comprehensive definition of American citizenship. In an opinion written shortly after the Fourteenth Amendment was ratified, the Court stated that one of the primary purposes of the Citizenship Clause was "to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State." *Slaughter-House Cases*, 16 Wall. 36, 73 (1873). In his study, The Adoption of the Fourteenth Amendment, Professor Flack similarly concluded that the Citizenship Clause "put beyond doubt and cavil in the original law, who were citizens of the United States." H. Flack, The Adoption of the Fourteenth Amendment 89 (1908). And in *Afroyim* both majority and dissenting Justices appear to have agreed on the basic proposition that the scope of the Citizenship Clause, whatever its effect, did reach *all* citizens. The opinion of the Court in *Afroyim* described the Citizenship Clause as "calculated completely to control the status of citizenship." 387 U. S., at 262. And the dissenting Justices agreed with this proposition to the extent of holding that the Citizenship Clause was a "declaration of the classes of individuals to whom citizenship initially attaches." *Id.*, at 292.

The majority opinion appears at times to rely on the argument that Bellei, while he concededly might

have been a naturalized citizen, was not naturalized "in the United States." This interpretation obviously imposes a limitation on the scope of the Citizenship Clause which is inconsistent with the conclusion expressed above that the Fourteenth Amendment provides a comprehensive definition of American citizenship, for the majority's view would exclude from the protection of that Clause all those who acquired American citizenship while abroad. I cannot accept the narrow and extraordinarily technical reading of the Fourteenth Amendment employed by the Court today. If, for example, Congress should decide to vest the authority to naturalize aliens in American embassy officials abroad rather than having the ceremony performed in this country, I have no doubt that those so naturalized would be just as fully protected by the Fourteenth Amendment as are those who go through our present naturalization procedures. Rather than the technical reading adopted by the majority, it is my view that the word "in" as it appears in the phrase "in the United States" was surely meant to be understood in two somewhat different senses: one can become a citizen of this country by being born *within* it or by being naturalized *into* it. This interpretation is supported by the legislative history of the Citizenship Clause. That clause was added in the Senate rather late in the debates on the Fourteenth Amendment, and as originally introduced its reference was to all those "born in the United States or *naturalized by the laws thereof.*" Cong. Globe, 39th Cong., 1st Sess., 2768. (Emphasis added.) The final version of the Citizenship Clause was undoubtedly intended to have this same scope. See Flack, *supra*, at 88–89.

The majority takes the position that Bellei, although admittedly a citizen of this country, was not entitled to the protections of the Citizenship Clause. I would not depart from the holding in *Afroyim* that every American

citizen has Fourteenth Amendment citizenship. Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his citizenship until he voluntarily renounces or relinquishes it.

The Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of "fairness." The majority takes a new step with the recurring theme that the test of constitutionality is the Court's own view of what is "fair, reasonable, and right." Despite the concession that Bellei was admittedly an American citizen, and despite the holding in *Afroyim* that the Fourteenth Amendment has put citizenship, once conferred, beyond the power of Congress to revoke, the majority today upholds the revocation of Bellei's citizenship on the ground that the congressional action was not "irrational or arbitrary or unfair." The majority applies the "shock-the-conscience" test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is "irrational or arbitrary or unfair," the statute must be constitutional.

Of course the Court's construction of the Constitution is not a "strict" one. On the contrary, it proceeds on the premise that a majority of this Court can change the Constitution day by day, month by month, and year by year, according to its shifting notions of what is fair, reasonable, and right. There was little need for the founders to draft a written constitution if this Court can say it is only binding when a majority finds it fair, reasonable, and right to make it so. That is the loosest construction that could be employed. It is true that England has moved along very well in the world without a written constitution. But with complete familiarity

with the English experience, our ancestors determined to draft a written constitution which the members of this Court are sworn to obey. While I remain on the Court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is "fair" and "reasonable." I would decide this case not by my views of what is "arbitrary," or what is "fair," but rather by what the Constitution commands.

I dissent.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Since the Court this Term has already downgraded citizens receiving public welfare, *Wyman* v. *James,* 400 U. S. 309 (1971), and citizens having the misfortune to be illegitimate, *Labine* v. *Vincent, ante,* p. 532, I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James* and *Labine,* the Court's opinion makes evident that its holding is contrary to earlier decisions. Concededly, petitioner was a citizen at birth, not by constitutional right, but only through operation of a federal statute. In the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" includes those naturalized through operation of an Act of Congress, wherever they may be at the time. Congress was therefore powerless to strip Bellei of his citizenship; he could lose it only if he voluntarily renounced or relinquished it. *Afroyim* v. *Rusk,* 387 U. S. 253 (1967). I dissent.

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JOHNSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 5247. Argued March 24, 1971—Decided April 5, 1971

138 U. S. App. D. C. 174, 426 F. 2d 651, certiorari dismissed as improvidently granted.

William J. Lippman, by appointment of the Court, 400 U. S. 940, argued the cause and filed briefs for petitioner.

Samuel Huntington argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Roger A. Pauley.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In the petitioner's trial on a charge of rape, the District Judge instructed the jury that it could return a verdict of guilty with the death penalty. Yet that verdict was constitutionally impermissible in light of this Court's decision in *United States* v. *Jackson*, 390 U. S. 570. See *Bailey* v. *United States*, 132 U. S. App. D. C. 82, 86 and n. 3, 405 F. 2d 1352, 1356 and n. 3. I think the extreme prejudice arising from this erroneous instruction requires reversal of the judgment of conviction and a remand of this case for a new trial. Cf. *Price* v. *Georgia*, 398 U. S. 323, 331–332.

KITCHENS *v.* SMITH, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 6131. Decided April 5, 1971

Petitioner challenges his 1944 robbery conviction, when he was not represented by counsel, on the basis of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). In his habeas corpus petition he stated that he was unable to obtain counsel "because of his impoverished condition," and at the hearing he said, "I didn't have any money and I didn't have a lawyer." Respondent made no effort to show that petitioner was not indigent at the time of his conviction. The Georgia courts denied his petition. *Held:* On this record petitioner proved he was without counsel due to indigency at the time of his conviction, and accordingly he is entitled to relief as *Gideon* is fully retroactive.

Certiorari granted; 226 Ga. 667, 177 S. E. 2d 87, reversed and remanded.

PER CURIAM.

Petitioner pleaded guilty to robbery in a Georgia state court in 1944. He was not represented by counsel at any time. While serving his sentence, petitioner escaped and did not return to Georgia until 1969, when he was returned to finish the remainder of his sentence. He then brought this habeas corpus action in county court, alleging that his conviction was void under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The county court denied relief because *Gideon* was "recent law and under the law at the time of his sentence, the sentence met the requirements of the law at that time." This was error since as we have often noted, *Gideon* is fully retroactive. See, *e. g.*, *Linkletter* v. *Walker*, 381 U. S. 618, 639 (1965); *Desist* v. *United States*, 394 U. S. 244, 250 n. 15 (1969); *McConnell* v. *Rhay*, 393 U. S. 2, 3 (1968); *Stovall* v. *Denno*, 388 U. S. 293, 297–298 (1967).

On appeal, the Georgia Supreme Court affirmed the denial of habeas corpus on different grounds, saying that petitioner did not testify at the habeas corpus hearing that he "wanted a lawyer, asked for one, or made any effort to get one" or that "because of his poverty, or for any other reason, he was unable to hire a lawyer." 226 Ga. 667, 177 S. E. 2d 87–88 (1970).

As this Court has said, however, "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962). This applies to guilty pleas as well as to trials. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441 (1948).

Of course, to establish his right to appointed counsel in 1944, petitioner had the burden of proving his inability at that time to hire an attorney. His petition for habeas corpus specifically averred that he was unable to obtain counsel "because of his impoverished condition" at that time. The respondent denied this allegation and thus put the matter in issue. At the hearing, petitioner testified, "I was a lot younger and *I didn't have any money* and I didn't have a lawyer . . . ." (Emphasis added.) The State made no effort whatever to contradict petitioner's testimony that he was indigent; no part of its case went to the issue of indigency. In this light, the Georgia Supreme Court's finding that petitioner "did not testify . . . that because of his poverty, or for any other reason, he was unable to hire a lawyer" is explicable only under the most rigid rules of testimonial construction. Though petitioner did not precisely testify that his failure to obtain a lawyer was a result of his indigency, this was the undeniable implication of his testimony, especially in view of the habeas corpus petition's allegation that petitioner was unable to hire an attorney "because of" his indigency. The hearing below, as the transcript shows, was conducted informally. Petitioner had

no lawyer, and introduced no evidence other than his own testimony. He testified discursively; no objections were made by the State, nor did it cross-examine petitioner on the issue of indigency.

It is our view that on this record petitioner proved he was without counsel due to indigency at the time of his conviction. The petition for certiorari is granted, the judgment of the Georgia Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reporter's Note

The next page is purposely numbered 901. The numbers between 849 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM FEBRUARY 19 THROUGH APRIL 5, 1971

FEBRUARY 19, 1971

Miscellaneous Order

No. ——. FAIRCHILD *v.* UNITED STATES. C. A. 10th Cir. Renewed application for stay presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Reported below: 435 F. 2d 972.

FEBRUARY 22, 1971

Affirmed on Appeal

No. 921. RICHARDSON *v.* KENNEDY, SECRETARY OF THE TREASURY. Affirmed on appeal from D. C. W. D. Pa. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set for oral argument. Reported below: 313 F. Supp. 1282.

Appeals Dismissed

No. 734. HEGARTY *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 915. CARTER, ADMINISTRATRIX *v.* HARTENSTEIN, DBA HARTENSTEIN ELEVATOR CO., ET AL. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 248 Ark. 1172, 455 S. W. 2d 918.

No. 1002. BARNARD ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of substantial federal question.

No. 1003. TAPE INDUSTRIES ASSOCIATION OF AMERICA ET AL. *v.* YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, ET AL. Appeal from D. C. C. D. Cal. dismissed for want of jurisdiction. Reported below: 316 F. Supp. 340.

No. 6229. ANDERSON *v.* NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 986. BAKER ET AL., TRUSTEES OF PROPERTY OF PENN CENTRAL TRANSPORTATION CO. *v.* PENNSYLVANIA ET AL. Appeal from D. C. W. D. Pa. Judgment vacated and case remanded with instructions to vacate the interlocutory injunction appealed from because the injunction, together with the underlying cause, has become moot.

No. 6047. CHRISTOPHER ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. Appeal from D. C. D. C. Judgment vacated and case remanded for further consideration in light of the judgment of this Court in No. 43, Orig., *Oregon* v. *Mitchell,* No. 44, Orig., *Texas* v. *Mitchell,* No. 46, Orig., *United States* v. *Arizona,* and No. 47, Orig., *United States* v. *Idaho* [400 U. S. 112]. Reported below: 318 F. Supp. 994.

Certiorari Granted—Vacated and Remanded

No. 6080. RAY *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Central District of California with directions to dismiss the application for habeas corpus as moot.

Miscellaneous Orders

No. ——. STANLEY *v.* OHIO. Sup. Ct. Ohio. Application for bail denied.

No. ——. CUMMINGS *v.* CITY OF TOLEDO. Sup. Ct. Ohio. Application for stay denied.

No. ——. MCKENZIE *v.* TEXAS. Ct. Crim. App. Tex. Motion of State of Texas to terminate petitioner's stay of execution denied. The papers filed on behalf of petitioner will be treated as a petition for writ of certiorari and placed on docket of this Court as No. 6623. Reported below: 450 S. W. 2d 341.

No. 31, Orig. UTAH *v.* UNITED STATES. Motion of the State of Utah for additional time to respond to exceptions of the United States to Report of Special Master granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For previous actions herein, see, *e. g.*, 400 U. S. 962.]

No. 44, Orig. TEXAS *v.* MITCHELL, ATTORNEY GENERAL, 400 U. S. 112. Motion of Dawn P. German for leave to intervene and to file petition for rehearing denied.

No. 507. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* JAVA ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 400 U. S. 877.] Motion of Stephen P. Berzon for leave to participate in oral argument *pro hac vice* granted.

No. 931. ENGELMAN, DIRECTOR, DIVISION OF PUBLIC WELFARE, DEPARTMENT OF INSTITUTIONS AND AGENCIES, ET AL. *v.* AMOS ET AL. Appeal from D. C. N. J. The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. 1341. JACKSON ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. Application for emergency relief presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 325 F. Supp. 864.

MR. JUSTICE DOUGLAS, concurring.

The Court properly stays its hand in this election case that comes to us with the customary plea for emergency action. It is not entirely clear that the three-judge court was properly convened. But assuming it was, the case is peculiarly appropriate for application of the abstention doctrine which we recently applied in *Reetz* v. *Bozanich*, 397 U. S. 82.

The Illinois statutes involved here have not been construed as respects the issues now tendered. Whether the federal question would be avoided by a state construction of the Illinois statutes is not known. There is, however, a built-in provision for judicial review in the Illinois Circuit Court of a decision of the Election Board. Ill. Rev. Stat., c. 46, § 10–10.1 (1967).

While these issues are by our federal standard "justiciable," federal courts are usually less able than state courts to work their way through a maze of state electoral laws. If federal courts take the laboring oar in these so-called "emergency" cases involving local electoral laws, they must make quick decisions on local-law issues that are often tangled with matters of local construction and administration.*

*One of the underlying local-law issues involves the question as to what people are qualified to sign nominating petitions for independent candidates such as appellants. There is one view that the signatures must be of persons who did not vote in the preceding primary election for nominees of candidates for that office, and there is the opposing view that any registered voter may sign nominating petitions for independent candidates.

The suit in the federal court was filed December 1970, the three-judge court rendering its decision on January 28, 1971. 325 F. Supp. 864. It was not until February 1, 1971, that appellant Jackson filed his nomination papers with the Board. On February 8, 1971, two registered voters filed written objections to those nomination papers. The Board gave notice of a hearing to be held February 11, 1971, on these objections. The Board on February 18, 1971, held that the nomination papers of appellant Jackson did not satisfy requirements of the Illinois election code. Hence it was apparent that the administrative decision of the Board came after the decision of the federal three-judge court. What appellants ask us in substance to do is to sit in direct review of the Election Board. The reason, of course, is that the primary will be held February 23, 1971, and the State will begin distributing the ballots which contain the names of the winners of the primary and the names of the independent candidates on March 8, 1971. Federal courts cannot act responsibly in those situations.

No. 880. KELLEY *v.* UNITED STATES. C. A. 9th Cir. Application for stay denied. Reported below: 426 F. 2d 296.

No. 1344. FITZPATRICK ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO ET AL. Appeal from D. C. N. D. Ill. Motion to expedite denied.

No. 6007. HALLEY *v.* UNITED STATES ET AL.;

No. 6134. HUNT *v.* EYMAN, WARDEN, ET AL.;

No. 6165. FORBES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 6176. GARDNER *v.* CALIFORNIA;

No. 6186. PERNELL *v.* NEIL, WARDEN, ET AL.; and

No. 6196. SZIJARTO *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6106. TARVER *v.* SMITH, SECRETARY OF DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 78 Wash. 2d 152, 470 P. 2d 172.

No. 6152. WILLIAMS *v.* GRAY, U. S. DISTRICT JUDGE;
No. 6277. CARROLL *v.* FAY, WARDEN; and
No. 6300. FENNELL ET AL. *v.* MATHES, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 582. LYNCH, ATTORNEY GENERAL OF CALIFORNIA, ET AL. *v.* GILMORE ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. Reported below: 319 F. Supp. 105.

No. 903. PORT OF PORTLAND ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Ore. Probable jurisdiction noted.

No. 6060. FUENTES ET AL. *v.* FAIRCLOTH, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 317 F. Supp. 954.

No. 6061. MAYER *v.* CITY OF CHICAGO. Appeal from Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 5850. TOWNSEND ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL.; and
No. 6000. ALEXANDER ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. Appeals from D. C. N. D. Ill. Motions for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Cases consolidated and a total of one hour allotted for oral argument. Reported below: 314 F. Supp. 1082.

Certiorari Granted

No. 1009. UNITED STATES *v.* UNICORN ENTERPRISES, INC., ET AL. C. A. 2d Cir. Certiorari granted.

No. 910. ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.; and

No. 961. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL. C. A. 6th Cir. Motion of American Federation of Labor & Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* in No. 961 granted. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 427 F. 2d 936.

No. 939. SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Motion of United States Ski Assn. et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 433 F. 2d 24.

No. 957. UNITED STATES ET AL. *v.* PULLMAN CO.; and

No. 6018. LOVE *v.* PULLMAN CO. C. A. 10th Cir. Motion of petitioner in No. 6018 for leave to proceed *in forma pauperis* granted. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 430 F. 2d 49.

No. 958. FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO. C. A. 5th Cir. Motions of Gainesville Utilities Department et al. and American Public Power Assn. for leave to file briefs as *amici curiae* granted. Certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions and petition. Reported below: 430 F. 2d 1377.

No. 1082. UNITED STATES *v.* MISSISSIPPI CHEMICAL CORP. ET AL. C. A. 5th Cir. Certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 1320.

No. 5798. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 236 So. 2d 442.

Certiorari Denied. (See also No. 6229, *supra.*)

No. 901. SHERMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1402.

No. 904. MCPHERSON *v.* WALKER ET AL. C. A. 8th Cir. Certiorari denied.

No. 905. ANCHOR COUPLING CO., INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 429.

No. 907. CONOLON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 324.

No. 908. STELLY *v.* BAUER DREDGING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 1251.

No. 909. SERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 911. SALANITRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 2d 59.

No. 914. TOLLEFSEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 2d 511.

No. 912. PORT OF NEW YORK AUTHORITY ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 663 and 670.

No. 916. KAPATOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 110.

No. 919. BEAUDRY *v.* VARGO. Sup. Ct. Wis. Certiorari denied. Reported below: 46 Wis. 2d 230, 175 N. W. 2d 473.

No. 924. MITCHELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 259.

No. 926. STERNER LIGHTING, INC., ET AL. *v.* ALLIED ELECTRICAL SUPPLY, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 539.

No. 927. PYRAMID LAKE PAIUTE TRIBE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 763.

No. 933. EL-GE POTATO CHIP CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 427 F. 2d 903.

No. 937. CHARLES *v.* BLOUNT, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 665.

No. 938. CENTRAL MACHINE & TOOL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 429 F. 2d 1127.

No. 940. BREAKEFIELD *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 442 F. 2d 1227.

No. 941. RIVEZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 2d 319.

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No. 944. ARMCO STEEL CORP. *v.* SCHUTTE, ADMINISTRATRIX, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 431 F. 2d 22.

No. 946. HOGG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 274.

No. 948. CITIZENS CASUALTY COMPANY OF NEW YORK *v.* STEWART, SUPERINTENDENT OF INSURANCE OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 685, 262 N. E. 2d 215.

No. 949. RUBINO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 284.

No. 951. TEXAS & PACIFIC RAILWAY CO. *v.* ALLEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 982.

No. 954. MITCHELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 432 F. 2d 354.

No. 955. ZABEL, EXECUTRIX, ET AL. *v.* TABB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 199.

No. 956. BUKACEK *v.* PELL CITY FARMS, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 286 Ala. 141, 237 So. 2d 851.

No. 959. WHEATLEY, COMMISSIONER OF FINANCE OF THE VIRGIN ISLANDS *v.* CHICAGO BRIDGE & IRON CO., LTD. C. A. 3d Cir. Certiorari denied. Reported below: 430 F. 2d 973.

No. 960. HACKIN ET UX., DBA H. S. HACKIN PLUMBING & HEATING CO., ET AL. *v.* PIONEER PLUMBING SUPPLY CO. C. A. 9th Cir. Certiorari denied.

No. 964. VAN SICKLE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 86 Nev. 531, 471 P. 2d 224.

No. 965. CARDWELL, WARDEN *v.* WOODARDS. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 978.

No. 967. THOMAS ET AL. *v.* HONEYBROOK MINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 428 F. 2d 981.

No. 968. BUKOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 1094.

No. 969. O'CONNOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 2d 752.

No. 970. FREY *v.* UNITED STATES; and
No. 974. MCKUIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 391.

No. 972. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1109.

No. 975. COLSON ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 1046.

No. 978. RING *v.* MAYOR OF RUTHERFORD ET AL. Super. Ct. N. J. Certiorari denied. Reported below: 110 N. J. Super. 441, 266 A. 2d 129.

No. 980. PIER 67, INC., AKA EDGEWATER INN *v.* KING COUNTY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 78 Wash. 2d 48, 469 P. 2d 902.

No. 981. INDUSTRIAL UNION DEPARTMENT, AFL–CIO, ET AL. *v.* BLACK HAWK CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 431 F. 2d 900.

No. 983. HUDSON TRANSIT LINES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 429 F. 2d 1223.

No. 985. BLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 96.

No. 987. NELLIS *v.* CENTRAL DISTRIBUTORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 369.

No. 990. FIRST NATIONAL BANK OF CHICAGO, GUARDIAN, ET AL. *v.* FIDELITY & CASUALTY COMPANY OF NEW YORK. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 2d 499.

No. 992. ISI CORP. ET AL. *v.* MYERS, EXECUTRIX, ET AL.; and

No. 998. SECURITY PACIFIC NATIONAL BANK, FORMERLY PACIFIC NATIONAL BANK OF SAN FRANCISCO *v.* MYERS, EXECUTRIX, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 769.

No. 995. AMERICAN ART INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: See 415 F. 2d 1223.

No. 997. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 1286.

No. 999. BROOKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 463 and 434 F. 2d 41.

No. 1001. NATIONAL SCREEN SERVICE CORP. *v.* POSTER EXCHANGE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 334.

No. 1004. HANSEN *v.* HAAGENSEN. Sup. Ct. Iowa. Certiorari denied. Reported below: 178 N. W. 2d 325.

No. 1005. BLALOCK ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 9 N. C. App. 94, 175 S. E. 2d 716.

No. 1006. WILSON ET AL. *v.* COMMERCIAL SECURITIES CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1305.

No. 1007. COHEN *v.* CENTRAL NATIONAL BANK OF JACKSONVILLE. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1232.

No. 1008. HAMILTON *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 427.

No. 1011. ALVAREZ ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 1261.

No. 1012. FORT HOWARD PAPER CO. *v.* SCOTT PAPER CO. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1198.

No. 1017. PETUSKEY ET AL. *v.* RAMPTON, GOVERNOR OF UTAH, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 378.

No. 1021. TOLIVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 867.

No. 5167. LEWIS *v.* LICAVOLI. App. Dept., Super Ct. Cal., County of San Francisco. Certiorari denied. Reported below: See 3 Cal. App. 3d 100 and 707, 83 Cal. Rptr. 81.

No. 5600. LINDSEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 153.

No. 5665. MANCE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5716. ROMANO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 26 N. Y. 2d 894 and 27 N. Y. 2d 734; 258 N. E. 2d 218 and 262 N. E. 2d 680.

No. 5707. SPIGNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 5742. HERNLEY ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: See 216 Pa. Super. 177, 263 A. 2d 904.

No. 5794. MEGLIORINO *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5808. CADOGAN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 165.

No. 5817. HUFF *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 186, 258 N. E. 2d 356.

No. 5823. DOUGLAS *v.* LOUISIANA ET AL. Sup. Ct. La. Certiorari denied. Reported below: 256 La. 186, 235 So. 2d 563.

No. 5838. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 7 Cal. App. 3d 314, 86 Cal. Rptr. 628.

No. 5844. MUSIL *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 930.

No. 5866. CARTER ET AL. *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5868. JOSEPH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 256 La. 627, 237 So. 2d 663.

No. 5872. HARRELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 3d 675, 470 P. 2d 640.

No. 5873. VAUGHN ET AL. *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 5877. BONNER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 639.

No. 5881. FRENCH *v.* CORRIGAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1211.

No. 5888. RUTLEDGE *v.* SHERIFF OF INGHAM COUNTY. Ct. App. Mich. Certiorari denied. Reported below: 21 Mich. App. 726, 176 N. W. 2d 417.

No. 6021. BROWN *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 6045. MASTERSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 499, 259 N. E. 2d 794.

No. 6050. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 430 F. 2d 1176.

No. 6052. FANALE *v.* ANDERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 172.

No. 6058. O'SHAUGHNESSY *v.* BISSELL. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1015.

No. 6062. HADLEY *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 6068. WIMBERLEY *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 6074. CURTIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 1159.

No. 6076. ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 971.

No. 6081. WASHINGTON ET AL. *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 6084. GINTER *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 416 F. 2d 1248.

No. 6085. JOHNSON *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6088. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 430 F. 2d 1309.

No. 6091. FRASER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 876.

No. 6096. MARANZE *v.* DAYTON SCHOOL BOARD ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 6109. IN RE SPIGNER. Sup. Ct. Cal. Certiorari denied.

No. 6115. JENKINS *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 6118. HALLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 1180.

No. 6119. GILHOUSEN *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 6120. PULLEY *v.* NORVELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 258.

No. 6122. CALDRONE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 205 Kan. 828, 473 P. 2d 66.

No. 6123. FROST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 431 F. 2d 1249.

No. 6125. RIDDICK *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 6129. GRAY *v.* UNITED STATES LINES. C. A. 2d Cir. Certiorari denied.

No. 6130. INMAN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 6141. WARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 6142. VAUGHN *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6143. SAILER *v.* REICHMANN ET AL. C. A. 9th Cir. Certiorari denied.

No. 6145. BRAXTON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6146. O'NEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 695.

No. 6147. ARNOLD *v.* COAKLEY, DISTRICT ATTORNEY OF ALAMEDA COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 6148. MAHONEY *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 106 Ariz. 297, 475 P. 2d 479.

No. 6149. ANDERSON *v.* SINGLETARY, JUDGE. C. A. 4th Cir. Certiorari denied.

No. 6150. NELSON *v.* ZELKER, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 2d 1055.

No. 6151. CORDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6153. REDA *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 6154. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 417 F. 2d 644.

No. 6155. BRYANT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6156. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 2d 1364.

No. 6157. KIMBRO *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 429 F. 2d 1319.

No. 6159. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 1.

No. 6160. ANGLE *v.* LAIRD, SECRETARY OF DEFENSE. C. A. 10th Cir. Certiorari denied. Reported below: 429 F. 2d 892.

No. 6161. FRISTOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 6162. WILLIAMS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6167. MANNING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 6168. VIGIL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 1037.

No. 6169. CRESPO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6170. PACHECO *v.* CASSCLES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6173. JOSEPH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 1206.

No. 6175. SPIGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6177. CURTIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 6178. CANTRELL *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 6179. SEWELL *v.* AVERY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 6180. MACHIN *v.* PINTO ET AL. C. A. 2d Cir. Certiorari denied.

No. 6181. JONES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6183. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 3d 894, 471 P. 2d 1008.

No. 6187. BEASLEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 205 Kan. 253, 469 P. 2d 453.

No. 6188. CASSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 6189. MCPEAK ET AL. *v.* ADJUSTMENT CORP. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 6191. BONGIORNO *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 1175.

No. 6193. SHIPP *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6194. PRUITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 1104.

No. 6198. WALLACE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 6201. FUENTES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 405.

No. 6203. BALDWIN *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 428 F. 2d 182.

No. 6204. RIDGILL *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6206. POSTELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 429 F. 2d 528.

No. 6207. AUER *v.* WAYNE STATE UNIVERSITY. Sup. Ct. Mich. Certiorari denied.

No. 6208. SABELLA *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 572.

No. 6209. EDLIN *v.* RICHARDSON, JUDGE. Ct. App. Ky. Certiorari denied.

No. 6211. LASSERE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 458 S. W. 2d 81.

No. 6216. FERREE *v.* BRANTLEY, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 6221. ARQUILLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6226. DEBOSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 433 F. 2d 916.

No. 6232. TARRANTS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 236 So. 2d 360.

No. 6233. HARRIS *v.* CITY OF HOUSTON. C. A. 5th Cir. Certiorari denied.

No. 6235. LAWRENCE *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 718.

No. 6236. BENTLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 250.

No. 6237. CARR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 229, 437 F. 2d 662.

No. 6250. CARRILLO *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 474 P. 2d 123.

No. 6251. SAUNDERS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6253. CRAWFORD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 6255. ARNOLD *v.* SMITHWICK. C. A. 5th Cir. Certiorari denied.

No. 6256. BURRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 399.

No. 6257. REMBERT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6258. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6262. FAUSTINO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 429.

No. 6265. BLUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1191.

No. 6266. BRIDDLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 4.

No. 6267. RADIL *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 288 Minn. 279, 179 N. W. 2d 602.

No. 6268. ROSENSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 640.

No. 6269. DE LA MOTTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 289.

No. 6274. PEPITONE *v.* PRELSNIK, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied.

No. 6275. MCKINNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1019 and 434 F. 2d 831.

No. 6276. SINGAL *v.* BLACKWELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 6278. RILEY *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1134.

No. 6281. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6288. HAYWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1112.

No. 6302. MONTERO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6304. WHITE *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 152. PATTERSON *v.* HUMBLE OIL & REFINING CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 423 F. 2d 883.

No. 448. KYRIACO ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied without prejudice, however, to petitioners' making their respective applications, if they so choose, to the District Court for such relief, if any, as may be appropriate in light of developments occurring since petition for writ of certiorari was filed in this Court. Reported below: 425 F. 2d 1069.

No. 722. NELSON ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 178 N. W. 2d 434.

No. 947. FONTANA AVIATION, INC. *v.* BEECH AIRCRAFT CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 432 F. 2d 1080.

No. 989. BILLY BAXTER, INC. *v.* COCA-COLA CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 183.

No. 906. LANG *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: — Tenn. App. —, 457 S. W. 2d 882.

No. 913. KOEN ET AL. *v.* LONG ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 876.

No. 918. RUSSELL *v.* GREENVILLE SHIPBUILDING CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 1168.

No. 932. BAINES *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 46 Ala. App. 72, 238 So. 2d 352.

No. 5611. JACKSON *v.* PATTERSON. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5800. GILKEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 6 Cal. App. 3d 183 and 7 Cal. App. 3d 557a; 85 Cal. Rptr. 642.

No. 5805. HOUP *v.* NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 254.

No. 5831. RUCKER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5835. MILLER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1001.

No. 6055. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 433 F. 2d 1292.

No. 925. EVANS *v.* UNITED STATES;

No. 930. AMABILE *v.* UNITED STATES; and

No. 1032. BATTAGLIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 432 F. 2d 1115.

No. 1020. TEITELBAUM *v.* UNITED STATES;

No. 1029. ROSELLI *v.* UNITED STATES; and

No. 1034. JACOBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 432 F. 2d 879.

No. 1110. ROBERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 880.

No. 6252. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 433 F. 2d 15.

No. 6254. MILLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 266.

No. 988. MINNESOTA MINING & MANUFACTURING CO. *v.* NORTON CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 426 F. 2d 1117.

No. 1019. RALPH PRINTING & LITHOGRAPHING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 433 F. 2d 1058.

No. 996. STERLING NATIONAL BANK OF DAVIE *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACK took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 514.

No. 5856. WHITEHEAD *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted.

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No. 1016. JONES *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 431 F. 2d 619.

No. 5942. SHIRLEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 256 La. 665, 237 So. 2d 676.

Rehearing Denied

No. 1101. NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY *v.* TEXAS HIGHWAY DEPARTMENT ET AL., 400 U. S. 968;

No. 5418. ETHRIDGE *v.* UNITED STATES, 400 U. S. 993;

No. 5437. ETHRIDGE *v.* UNITED STATES, 400 U. S. 1000;

No. 5846. LEWIS *v.* ROBINSON, U. S. DISTRICT JUDGE, ET AL., 400 U. S. 959;

No. 5885. BRISCOE *v.* UNITED STATES, 400 U. S. 966;

No. 5947. FLETCHER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT, 400 U. S. 997;

No. 5972. HAHN *v.* SMITH, WARDEN, 400 U. S. 1010; and

No. 6043. ROGERS *v.* CALIFORNIA, 400 U. S. 1018. Petitions for rehearing denied.

No. 385. PUERTO RICO TELEPHONE CO. *v.* FIGUEROA DE ARROYO ET AL., 400 U. S. 877, 953. Motion for leave to file second petition for rehearing denied.

No. 556. SACCO, AKA ROSSELLI *v.* UNITED STATES, 400 U. S. 903. Motion for leave to file petition for rehearing denied.

No. 762. JOHNSON *v.* GOODYEAR TIRE & RUBBER CO. ET AL., 400 U. S. 962. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 633. RAY, TRADING AS CANDIS O. RAY AGENCY *v.* KANSAS CITY STOCKYARDS COMPANY OF MAINE, TRADING AS GOLDEN OX RESTAURANT, ET AL., 400 U. S. 999. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 5882. WILLIAMS *v.* NEIL, WARDEN, 400 U. S. 966. Motion for leave to file petition for rehearing and other relief denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fifth Circuit beginning February 1, 1971, and ending February 4, 1971, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Tenth Circuit during the week of March 22, 1971, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

FEBRUARY 24, 1971

Miscellaneous Order

No. 5481. SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. [Certiorari granted, 400 U. S. 865.] Application for injunctive relief presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL are of the opinion that the application should be granted.

MARCH 1, 1971

Affirmed on Appeal

No. 1038. LISKER *v.* KELLEY, SECRETARY OF THE COMMONWEALTH, ET AL. Affirmed on appeal from D. C. M. D. Pa. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent. MR. JUSTICE BLACK is of the opinion that the case should be dismissed as moot. Reported below: 315 F. Supp. 777.

No. 1071. BOAT TRANSIT, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. Mich. MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 1080. FAIR ET AL. *v.* KIRK, GOVERNOR OF FLORIDA, ET AL. Affirmed on appeal from D. C. N. D. Fla. Reported below: 317 F. Supp. 12.

Appeals Dismissed

No. 929. MORSE *v.* HINDMAN ET AL. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 205 Kan. 207, 468 P. 2d 103.

No. 994. BURTON ET AL. *v.* AMERICAN NATIONAL BANK & TRUST CO., TRUSTEE, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 46 Ill. 2d 249, 263 N. E. 2d 833.

No. 787. OHLENDORF ET UX. *v.* GAYLES ET AL. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1026. FENTON ET AL. *v.* SCHOOL COMMITTEE OF BOSTON. Appeal from Sup. Jud. Ct. Mass. Motion of National Education Assn. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Mass. ——, 260 N. E. 2d 676.

No. 1031. SCHNEIDER *v.* CALIFORNIA. Appeal from C. A. 9th Cir. Motion for leave to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 427 F. 2d 1178.

No. 1096. SMITH *v.* EASTERN ORTHODOX CHURCHES OF GREATER DETROIT ET AL. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Reported below: 384 Mich. 82, 180 N. W. 2d 265.

No. 5946. WRIGHT *v.* MISSISSIPPI. Appeal from Sup. Ct. Miss. Motion for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 236 So. 2d 408.

Vacated and Remanded on Appeal

No. 1068. KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* KARP ET AL. Appeal from D. C. N. J. Judgment vacated and case remanded for further consideration in light of judgment of this Court in No. 2, *Younger* v. *Harris* [*ante*, p. 37], No. 7, *Samuels* v. *Mackell*, and No. 9, *Fernandez* v. *Mackell* [*ante*, p. 66]. MR. JUSTICE DOUGLAS is of the opinion that the judgment should be affirmed for reasons set forth in his dissenting opinion in *Younger* v. *Harris*, *ante*, p. 58. Reported below: 310 F. Supp. 627.

Certiorari Granted—Vacated and Remanded

No. 74. ZIM ISRAEL NAVIGATION CO., LTD. *v.* TARABOCCHIA. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494, decided January 25, 1971. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE BRENNAN dissent. Reported below: 417 F. 2d 476.

*Miscellaneous Orders**

No. ——. KARR ET AL. *v.* SCHMIDT ET AL. C. A. 5th Cir. Motion to vacate stay of injunction denied.

No. ——. SPILLERS *v.* SLAUGHTER ET AL.; and

No. ——. POPE ET AL. *v.* HAIMOWITZ ET AL. D. C. M. D. Fla. Applications for stay and/or injunctive relief presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

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*For Court's order prescribing amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure, see *post*, p. 1019.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Report of Special Master on application of States of California, Arizona, and Indiana for leave to intervene is adopted. [For earlier orders herein, see, *e. g.*, 400 U. S. 1019.]

No. 89. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034];

No. 153. TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, *sub nom. Tilton* v. *Finch*, 399 U. S. 904];

No. 569. EARLEY ET AL. *v.* DICENSO ET AL.; and

No. 570. ROBINSON, COMMISSIONER OF EDUCATION OF RHODE ISLAND, ET AL. *v.* DICENSO ET AL. Appeals from D. C. R. I. [Probable jurisdiction noted, 400 U. S. 901.] Motion of National Association of Laymen to file a brief as *amicus curiae* in No. 89 granted. Motion of Connecticut State Conference on Branches of NAACP et al. for leave to file a brief as *amici curiae* in Nos. 89 and 153 granted. Motion of Center for Law and Education et al. for leave to file a brief as *amici curiae* in No. 89 out of time granted. Motion of National Catholic Educational Assn. et al. for leave to file a brief as *amici curiae* in Nos. 569 and 570 granted. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN are of the opinion that these motions should be denied because they were untimely filed. Motions to file briefs as *amici curiae*, in Nos. 569 and 570, by Connecticut State Conference on Branches of NAACP et al., Center for Law & Education et al., and American Jewish Committee et al., granted. Motion of Peter L. Costas, Esquire, for leave to participate in oral argument on behalf of Connecticut State Conference on Branches of NAACP et al. as *amici curiae* denied.

No. 338. BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL. C. A. 7th Cir. [Certiorari granted, 400 U. S. 864.] Motion of Blumcraft of Pittsburgh opposing motion of Kawneer Co., Inc., for leave to file a brief as *amicus curiae*, after argument, denied.

No. 360. GROVE PRESS, INC., ET AL. *v.* FLASK ET AL. Appeal from D. C. N. D. Ohio. Motion of appellee Gilmartin to amend his original motion to dismiss or affirm granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 507. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* JAVA ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 400 U. S. 877.] Motion of appellees to strike brief for the United States as *amicus curiae* denied.

No. 712. TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL. C. A. 4th Cir. [Certiorari granted, 400 U. S. 963.] Motion for injunction presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that the motion should be granted.

No. 835. DEWEY *v.* REYNOLDS METALS CO. C. A. 6th Cir. [Certiorari granted, 400 U. S. 1008.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 30 minutes allotted for that purpose. Respondent allotted 30 additional minutes for oral argument. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITE are of the opinion that the motion should be denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

No. 982. ECKELS ET AL. *v.* ROSS ET AL. C. A. 5th Cir. Application for stay of modification as required by the Court of Appeals presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. Reported below: 434 F. 2d 1140.

No. 1258. UNITED AIRCRAFT CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Motion of respondent District 91, International Association of Machinists & Aerospace Workers, AFL–CIO, to advance disposition of petition denied. Reported below: 434 F. 2d 1198.

No. 6259. POPE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, ET AL.; and

No. 6264. THOMAS *v.* WINGO, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6351. ERICKSEN *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 91. ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Sup. Ct. N. J. Probable jurisdiction noted limited to Questions 1, 2, 3, and 4 as set forth in the jurisdictional statement which read as follows:

"1. Whether a state immunity statute, and in particular N. J. S. A. 52:9M–17, which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination?

"2. Whether *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), which stated that 'absolute immunity against further prosecution' is required before the Fifth Amendment privilege may be supplanted, is still the law of the land?

"3. Whether the immunity statute in question, N. J. S. A. 52:9M–17 is constitutionally defective due to its provision that only a 'responsive' answer, or evidence derived therefrom will not be used against the witness, where the statute provides no guidelines for determining what is a 'responsive' answer?

"4. Whether the immunity statute, N. J. S. A. 52:9M–17, can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?"

As to all other questions set forth in the jurisdictional statement, the appeal is dismissed for want of a substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this matter. Reported below: 55 N. J. 249, 261 A. 2d 129. [For earlier orders herein, see, *e. g.*, 398 U. S. 948.]

No. 430. REED *v.* REED, ADMINISTRATOR. Appeal from Sup. Ct. Idaho. Probable jurisdiction noted. [For earlier order herein, see 400 U. S. 816.]

No. 769. ELLINGTON, GOVERNOR OF TENNESSEE, ET AL. *v.* BLUMSTEIN. Appeal from D. C. M. D. Tenn. Probable jurisdiction noted.

No. 804. EISENSTADT, SHERIFF *v.* BAIRD. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 429 F. 2d 1398.

No. 1042. DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL. Appeal from D. C. S. D. Fla. Probable jurisdiction noted. Reported below: 316 F. Supp. 1116.

No. 810. UNITED STATES *v.* MARION ET AL. Appeal from D. C. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

No. 1091. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BELCHER. Appeal from D. C. S. D. W. Va. Probable jurisdiction noted. Reported below: 317 F. Supp. 1294.

No. 1025. UNITED STATES *v.* BREWSTER. Appeal from D. C. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

No. 1100. BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL. Appeal from D. C. W. D. Tex. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 326 F. Supp. 158.

No. 6356. LYNCH ET AL. *v.* HOUSEHOLD FINANCE CORP. ET AL. Appeal from D. C. Conn. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 318 F. Supp. 1111.

Certiorari Granted

No. 565. SARNO ET AL. *v.* ILLINOIS CRIME INVESTIGATING COMMISSION. Sup. Ct. Ill. Petition for writ of certiorari granted limited to Questions 1 and 3 as set forth in the petition which read as follows:

"1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

"3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?"

Reported below: 45 Ill. 2d 473, 259 N. E. 2d 267.

No. 892. GIGLIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted.

No. 1028. UNITED STATES *v.* CAMPOS-SERRANO. C. A. 7th Cir. Certiorari granted. Reported below: 430 F. 2d 173.

No. 1092. VICTORY CARRIERS, INC., ET AL. *v.* LAW. C. A. 5th Cir. Certiorari granted. Reported below: 432 F. 2d 376.

No. 1060. HAWAII *v.* STANDARD OIL CO. OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 1282.

No. 5944. ALEXANDER *v.* LOUISIANA. Sup. Ct. La. Motion to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 255 La. 941, 233 So. 2d 891.

Certiorari Denied. (See also Nos. 787, 929, 994, 1026, 1031, and 5946, *supra.*)

No. 720. NORTON *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 93 Idaho 648, 470 P. 2d 413.

No. 767. COSTELLO *v.* NEW JERSEY. Super Ct. N. J. Certiorari denied.

No. 795. NICKLOS DRILLING CO. *v.* UNIT CRANE & SHOVEL CORP.; and

No. 796. FONTENOT *v.* UNIT CRANE & SHOVEL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 569.

No. 805. BETO, CORRECTIONS DIRECTOR *v.* KING. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 221.

No. 819. OWINGS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 8 Md. App. 572, 261 A. 2d 223.

No. 822. ROD RIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 948.

No. 862. LAGERQUIST ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 254 S. C. 501, 176 S. E. 2d 141.

No. 922. HANKINS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 977. MARTIN-MARIETTA CORP. ET AL. *v.* MARICOPA COUNTY;

No. 984. UNITED CONCRETE PIPE CORP. ET AL. *v.* MARICOPA COUNTY ET AL.; and

No. 1013. AMERICAN PIPE & CONSTRUCTION CO. ET AL. *v.* MARICOPA COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 1145.

No. 1024. GEYER BROADCASTING CO., INC. *v.* HOLDER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 1027. THE ELECTRA ET AL. *v.* CONTINENTAL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 391.

No. 1033. BRASWELL MOTOR FREIGHT LINES, INC. *v.* TEAMSTERS LOCAL UNIONS 745 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 1371.

No. 1035. HORVATH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1043. E. V. WILLIAMS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 432 F. 2d 557.

No. 1037. PEACOCK *v.* RETAIL CREDIT CO. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 31.

No. 1039. TOCCO *v.* UNITED STATES; and

No. 1040. NASSE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1293.

No. 1046. BARASH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 358.

No. 1051. REIFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 257.

No. 1052. SIDNEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 60.

No. 1053. FOSTER WHEELER CORP. *v.* BABCOCK & WILCOX CO. C. A. 3d Cir. Certiorari denied. Reported below: 432 F. 2d 385.

No. 1054. THURMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: — Tenn. App. —, 455 S. W. 2d 177.

No. 1055. ASHBROOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 988.

No. 1056. HING WAN WONG *v.* LIQUOR CONTROL COMMISSION. Sup. Ct. Conn. Certiorari denied. Reported below: 160 Conn. 1, 273 A. 2d 709.

No. 1057. BONDHOLDERS PROTECTIVE COMMITTEE (OF THE 3¼% GENERAL MORTGAGE BONDS OF THE CENTRAL RAILROAD CO.) *v.* 3¼% MORTGAGE BONDHOLDERS PROTECTIVE COMMITTEE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 429 F. 2d 507.

No. 1075. VIGGIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 716.

No. 1063. SOUTHWIRE CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1050.

No. 1064. STAHLIN BROS. FIBRE WORKS, INC. *v.* PANDUIT CORP. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 221.

No. 1065. KENNEDY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 470 P. 2d 372 and 474 P. 2d 127.

No. 1072. RICCHETTI, DBA KINGS COUNTY DISTRIBUTING CO., ET AL. *v.* MEISTER BRAU, INC. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 1211.

No. 1077. NAGELBERG ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 585.

No. 1083. APPALACHIAN VOLUNTEERS, INC., ET AL. *v.* CLARK, SUPERINTENDENT OF SCHOOLS OF FLOYD COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 432 F. 2d 530.

No. 1084. S. FELICIONE & SONS FISH CO., INC. *v.* CITIZENS CASUALTY CO. OF NEW YORK. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 136.

No. 1085. WATERMAN STEAMSHIP CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 1185.

No. 1086. MACFARLANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 703.

No. 1088. VANDYGRIFT *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 1093. AULD, ADMINISTRATRIX *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. Sup. Ct. Mo. Certiorari denied. Reported below: 263 S. W. 2d 297.

No. 1094. SANFIRA *v.* MOGA. Sup. Ct. Ohio. Certiorari denied.

No. 1095. BORDEN, INC. *v.* ICE CREAM DRIVERS & EMPLOYEES UNION LOCAL 757. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 41.

No. 1097. WOLFISH *v.* KLEIN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 113, 305 N. Y. S. 2d 879.

No. 1098. GARFIELD & Co. *v.* WIEST. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 849.

No. 1099. DIPPOLITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 1049.

No. 1105. MALINSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1106. BRIDGE CORPORATION OF AMERICA *v.* AMERICAN CONTRACT BRIDGE LEAGUE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1365.

No. 1107. SELECT MINORITY TRUST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 388.

No. 1108. RAY, TRADING AS CANDIS O. RAY AGENCY *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 1155. TRI-SERVICE DRILLING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 1271.

No. 1194. MORAN OIL PRODUCING & DRILLING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 2d 746.

No. 5516. MCDANIEL *v.* SHERIFF OF DALLAS COUNTY. C. A. 5th Cir. Certiorari denied.

No. 5570. GARFIAS ET UX. *v.* COLLECTIONS UNLIMITED. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 5769. CINNAMON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 455 S. W. 2d 583.

No. 5834. CLARKE *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 1322.

No. 5855. GUNTHORPE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 81 N. M. 515, 469 P. 2d 160.

No. 5884. LAPLACA *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 5900. MEADOWS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 1176.

No. 5905. FRINK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 896, 311 N. Y. S. 2d 1016.

No. 5908. TATE, AKA BUTLER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 540, 259 N. E. 2d 791.

No. 5910. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 5936. MARTINEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 174, 311 N. Y. S. 2d 117.

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No. 5913. RICEHILL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 178 N. W. 2d 288.

No. 5943. AMOS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 234 So. 2d 630.

No. 5964. WALKER *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5969. IN RE BROWN. C. A. 3d Cir. Certiorari denied.

No. 5980. BROWN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 457.

No. 6001. TASSE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 6002. SOTO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 456 S. W. 2d 389.

No. 6004. HENDERSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: See 6 Mich. App. 379, 149 N. W. 2d 258.

No. 6015. DILLON *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 93 Idaho 698, 471 P. 2d 553.

No. 6031. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 1325.

No. 6135. MCGEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 395.

No. 6192. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 433 F. 2d 341.

No. 6205. BRANDOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 431 F. 2d 1391.

No. 6213. TROTTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 433 F. 2d 113.

No. 6215. EARLEY *v.* CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6218. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 2d 760.

No. 6220. MILLER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6222. WILKENS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6238. THOMPSON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1393.

No. 6240. SCHROEDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 2d 846.

No. 6241. CONKLIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 542.

No. 6242. DAVIS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 2 Wash. App. 380, 467 P. 2d 875.

No. 6245. WALKER *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6246. PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 962.

No. 6248. MCDOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6260. MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 891.

No. 6271. MOODY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 74.

No. 6270. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 165.

No. 6283. GLASSHOFER *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6284. DONOVAN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 364, 433 F. 2d 522.

No. 6285. FOGGY *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 6286. THOMPSON *v.* UNITED STATES; and
No. 6287. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 432 F. 2d 997.

No. 6292. PERKINS *v.* BROWN ET AL. Sup. Ct. La. Certiorari denied. Reported below: 256 La. 859, 239 So. 2d 360.

No. 6296. NEWTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 163.

No. 6298. BIVENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6301. OLIVER *v.* ELLENBOGEN, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 6309. SAILER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6312. BUCHANAN *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 6313. TADDEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 228.

No. 6315. MEEKS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6320. FLETCHER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6321. GOMORI *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6323. WILLIAMS *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6324. DELPH *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 6327. ROBLES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 155, 263 N. E. 2d 304.

No. 6328. CORDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6330. CLEMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 177, 440 F. 2d 205.

No. 6333. MORRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 1227.

No. 6334. BYRD *v.* FITZHARRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 937.

No. 6336. MCCARTY *v.* GAFFNEY, WARDEN. Sup. Ct. Kan. Certiorari denied.

No. 6340. HOWELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6341. CAMPBELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 26 Mich. App. 196, 182 N. W. 2d 4.

No. 6344. RUBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 442.

No. 6345. DIGGS *v.* MOONEY ET AL. Sup. Ct. Ill. Certiorari denied.

No. 6349. ESCOBAR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6352. PHILLIPS *v.* WADE ET AL. Ct. App. Ky. Certiorari denied.

No. 6354. VINCENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 6355. MARAS *v.* GEHRING. C. A. D. C. Cir. Certiorari denied.

No. 6360. SEYMOUR *v.* O'SHEA ET AL. C. A. 7th Cir. Certiorari denied.

No. 6361. COBB *v.* RAILROAD RETIREMENT BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 406.

No. 6371. BORELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 500.

No. 6372. SAMUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 433 F. 2d 663.

No. 6374. HUFFMAN *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 819.

No. 6376. STANDLEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 6378. JONES ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 457 S. W. 2d 627.

No. 6383. STOKES ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 325, 263 N. E. 2d 21.

No. 6384. MORGAN *v.* NULL ET AL. C. A. 2d Cir. Certiorari denied.

No. 6388. HARKEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 123 Ill. App. 2d 256, 260 N. E. 2d 55.

No. 766. TURNER, ATTORNEY GENERAL OF IOWA, ET AL. *v.* WILHELM ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 177.

No. 950. OTTER TAIL POWER CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 429 F. 2d 232.

No. 991. KOSERKOFF *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 1049.

No. 1067. FIRST NATIONAL BANK OF CORNELIA *v.* JACKSON, SUPERINTENDENT OF BANKS OF GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 430 F. 2d 1200.

No. 1069. WEIL, AKA GIDEON, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 1320.

No. 1078. HERPICH ET AL. *v.* WILDER ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 430 F. 2d 818.

No. 1109. GUZICK *v.* DREBUS ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 594.

No. 6243. LOCKE, AKA JOHNSON *v.* ERICKSON, WARDEN. Sup. Ct. S. D. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 85 S. D. 262, 181 N. W. 2d 100.

No. 1036. LASH, WARDEN *v.* BROWN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 432 F. 2d 1129.

No. 1079. DOBBS HOUSES, INC. *v.* SANDERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 431 F. 2d 1097.

No. 1047. AMERICAN RADIATOR & STANDARD SANITARY CORP. ET AL. *v.* UNITED STATES ET AL.;

No. 1048. BORG-WARNER CORP. *v.* UNITED STATES;

No. 1049. HELD *v.* UNITED STATES; and

No. 1050. KOHLER CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 433 F. 2d 174.

No. 1058. BOIARDO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 111 N. J. Super. 219, 268 A. 2d 55.

No. 1061. CURRY *v.* SHER ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 1062. FIELDS PRODUCTIONS, INC. *v.* UNITED ARTISTS CORP. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 432 F. 2d 1010.

No. 1070. ROY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 124 Ill. App. 2d 52, 260 N. E. 2d 5.

No. 1089. DUNCAN ET AL. *v.* CRANSTON ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 428 F. 2d 822.

No. 6359. LEVINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 430 F. 2d 641.

No. 6249. POPE *v.* UNITED STATES. C. A. 8th Cir. Motion to defer consideration of petition denied. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and petition. Reported below: 434 F. 2d 325.

Rehearing Denied

No. 776. RODICKER *v.* ILLINOIS CENTRAL RAILROAD CO., 400 U. S. 1012;

No. 813. TIMMONS *v.* SOUTH CAROLINA TRICENTENNIAL COMMISSION ET AL., 400 U. S. 986; and

No. 829. ADLER CONSTRUCTION CO. *v.* UNITED STATES, 400 U. S. 993. Petitions for rehearing denied.

No. 868. HARPER *v.* UNITED STATES, 400 U. S. 1024;

No. 5678. DAEGELE *v.* CROUSE, WARDEN, 400 U. S. 1010;

No. 5843. CHAPMAN *v.* UNITED STATES, 400 U. S. 995;

No. 6020. HAWKINS ET AL. *v.* SMITH ET AL., 400 U. S. 999;

No. 6053. HARRISON *v.* CLARK COUNTY SCHOOL DISTRICT ET AL., 400 U. S. 1021;

No. 6072. LOGAN *v.* CASSCLES, WARDEN, 400 U. S. 1022;

No. 6078. GILBOY *v.* UNITED STATES, 400 U. S. 1022; and

No. 6095. AKERS *v.* UNITED STATES, 400 U. S. 1023. Petitions for rehearing denied.

No. 113. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL., 400 U. S. 348. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

MARCH 5, 1971

Dismissal Under Rule 60

No. 545. NATIONAL INDUSTRIES FOR THE BLIND *v.* BALLERINA PEN CO., INC., ET AL. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 140 U. S. App. D. C. 98, 433 F. 2d 1204.

MARCH 8, 1971

Dismissals Under Rule 60

No. 740. GREEN *v.* KENTUCKY. Ct. App. Ky. [Certiorari granted, 400 U. S. 990.] Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 454 S. W. 2d 336.

No. 1142. PRATZ ET AL. *v.* LOUISIANA POLYTECHNIC INSTITUTE ET AL. Appeal from D. C. W. D. La. dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 316 F. Supp. 872.

Affirmed on Appeal

No. 1133. WILLIAMS, GUARDIAN, ET AL. *v.* MCNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL. Affirmed on appeal from D. C. S. C. MR. JUSTICE HARLAN is of the view that the Court lacks jurisdiction over this direct appeal from decision of three-judge court denying injunctive relief because state statute attacked was not one of "general and statewide application." *Moody* v. *Flowers*, 387 U. S. 97, 101 (1967). Therefore, he would vacate judgment of District Court and remand case to that court so that it might enter a fresh decree from which timely appeal could be taken to the Court of Appeals. See *Rockefeller* v. *Catholic Medical Center*, 397 U. S. 820 (1970). Reported below: 316 F. Supp. 134.

Appeals Dismissed

No. 1115. MAGAR *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1132. CITY OF MILLARD ET AL. *v.* CITY OF OMAHA ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN is of the opinion that probable jurisdiction should be noted and the case set for oral argument. Reported below: 185 Neb. 617, 177 N. W. 2d 576.

No. 1151. IN RE NAPOLITANO. Appeal from Ill. Cts. Comm'n dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would dismiss the appeal for want of jurisdiction.

Certiorari Granted—Vacated and Remanded. (See also No. 5928, *ante*, p. 481.)

No. 6394. YETO *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further proceedings in light of *Johnson* v. *United States*, 352 U. S. 565.

Miscellaneous Orders

No. ——. HAYWOOD *v.* MERRILL, U. S. CIRCUIT JUDGE, ET AL. C. A. 9th Cir. Motion of National Basketball Assn. to vacate stay heretofore granted by MR. JUSTICE DOUGLAS [*sub nom. Haywood* v. *National Basketball Assn.*, *post*, p. 1204] denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that the motion to vacate should be granted.

No. ——. GALASSO *v.* COMMANDING OFFICER, U. S. ARMY, FT. HAMILTON, NEW YORK, ET AL. C. A. 2d Cir. Application for stay of mandate of United States Court of Appeals for the Second Circuit and for release on bail denied. Reported below: 438 F. 2d 339.

No. 91. ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Sup. Ct. N. J. [Probable jurisdiction noted, *ante*, p. 933.] Application for release on bail denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 1341. JACKSON ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. Motion to expedite consideration of appeal denied. [For previous order herein, see *ante*, p. 904.]

No. 1363. CATENA *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Super. Ct. N. J. Motion to expedite consideration of appeal denied. MR.

JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 712. TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL. C. A. 4th Cir. [Certiorari granted, 400 U. S. 963.] Motion of the Solicitor General for leave to permit Wm. Bradford Reynolds to present oral argument *pro hac vice* granted.

No. 1386. CHICAGO HOUSING AUTHORITY ET AL. *v.* GAUTREAUX ET AL. C. A. 7th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 436 F. 2d 306.

No. 1390. PRUETT *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Application for stay of mandate presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 463 S. W. 2d 191.

No. 5105. ZENITH RADIO CORP. *v.* CASTLE, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 1129. FEIN *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7 OF YONKERS, NEW YORK, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 430 F. 2d 376.

No. 6048. ADAMS *v.* ILLINOIS. Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 as set forth in petition which reads as follows:

"2. Whether *Coleman* v. *Alabama*, 399 U. S. 1 (1970) is retroactive and/or applicable to a cause where, prior to trial, the defendant objected to the failure to provide counsel at the preliminary hearing?"

Reported below: 46 Ill. 2d 200, 263 N. E. 2d 490.

No. 5940. HAINES *v.* KERNER ET AL. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 427 F. 2d 71.

Certiorari Denied. (See also No. 1115, *supra.*)

No. 238. OLSON BODIES, INC., FORMERLY GRUMMAN ALLIED INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 420 F. 2d 1187.

No. 900. YORK ET UX. *v.* BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT 89, OKLAHOMA COUNTY. C. A. 10th Cir. Certiorari denied. Reported below: 429 F. 2d 66.

No. 963. MACK *v.* FLORIDA STATE BOARD OF DENTISTRY. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 862.

No. 1113. LEE WAY MOTOR FREIGHT, INC. *v.* JONES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 245.

No. 1116. GALTIERI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 234 So. 2d 172.

No. 1117. FEIN *v.* FOLLETTE, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 835, 312 N. Y. S. 2d 531.

No. 1118. THOMAIDIS ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 711.

No. 1122. METROPOLITAN FEDERAL SAVINGS & LOAN ASSOCIATION OF NEW YORK *v.* EAST BROOKLYN SAVINGS BANK, AKA METROPOLITAN SAVINGS BANK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1119. PACIFIC INDEMNITY CO. *v.* ACEL DELIVERY SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 952.

No. 1120. O'HAIR ET AL. *v.* PAINE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 66.

No. 1123. JACKSON FARMERS, INC., FORMERLY FARMERS UNION CO-OPERATIVE BUSINESS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 2d 1042.

No. 1124. JACK NEILSON, INC. *v.* THE TUG PEGGY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 54.

No. 1125. FERGUSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1128. PELTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 48.

No. 1130. NOLYNN ASSOCIATION OF SEPARATE BAPTIST IN CHRIST OF KENTUCKY ET AL. *v.* OAK GROVE SEPARATE BAPTIST CHURCH ET AL. Ct. App. Ky. Certiorari denied. Reported below: 457 S. W. 2d 633.

No. 1131. 21 TURTLE CREEK SQUARE, LTD. *v.* NEW YORK STATE TEACHERS' RETIREMENT SYSTEM. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1366 and 432 F. 2d 64.

No. 1135. SCORATOW, AKA SIMON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1288.

No. 1137. TRIPLETT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 109, 263 N. E. 2d 24.

No. 1140. D. S. Brown Co. et al. *v.* Acme Highway Products Corp. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 1074.

No. 1141. Package Devices, Inc. *v.* Sun Ray Drug Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 432 F. 2d 272.

No. 1143. McMahan *v.* States Steamship Co. Sup. Ct. Ore. Certiorari denied. Reported below: 256 Ore. 554, 474 P. 2d 515.

No. 1144. Melzer *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 1145. Quest, Inc., et al. *v.* Mercantile National Bank of Chicago et al. C. A. 7th Cir. Certiorari denied. Reported below: 431 F. 2d 261.

No. 1149. Davenport *v.* City Rent and Rehabilitation Administration of the City of New York et al. C. A. 2d Cir. Certiorari denied.

No. 1152. Baker Mfg. Co. *v.* Whitewater Mfg. Co. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 1008.

No. 1153. Charles Sales Corp. et al. *v.* Hodgskin et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 239 So. 2d 106.

No. 5704. Leeper *v.* Michigan. Sup. Ct. Mich. Certiorari denied.

No. 5960. Norman *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 121 Ga. App. 753, 175 S. E. 2d 119.

No. 6024. Washington *v.* Superior Court for Los Angeles County. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6025. COLE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 61.

No. 6039. EDDINS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 6056. WARDROP *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6064. CLAUNCH *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 2d 841.

No. 6214. SMITH *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 6293. CHILDRESS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 484.

No. 6308. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied Reported below: 435 F. 2d 698.

No. 6314. CRAFT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 981.

No. 6322. BENNETT *v.* VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 427 F. 2d 535.

No. 6348. SADOWY *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6357. NEAL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 6363. MEYERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 435 F. 2d 171.

No. 6365. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 205.

No. 6379. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 927.

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No. 6368. TATE *v.* DAGGETT, ACTING WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 823.

No. 6380. ELMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 332.

No. 6391. TULL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 6392. WEBB *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 2d 400.

No. 6393. HILLIKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 101.

No. 6395. LACEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 239 So. 2d 628.

No. 6396. QUINLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 2d 237, 262 N. E. 2d 22.

No. 6397. SCOTT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: See 122 Ill. App. 2d 430, 259 N. E. 2d 338.

No. 6399. KOPEC *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 38, 269 A. 2d 73.

No. 6402. RODRIQUEZ-GASTELUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 536.

No. 6403. CLARK *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: 110 N. J. Super. 562, 266 A. 2d 315.

No. 6404. MCKINNEY *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied.

No. 6405. STOKES *v.* HOWARD, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6406. DELGADO *v.* ZELKES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6407. DOWELL *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6409. PETWAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 6410. GLASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 6412. MULLIGAN *v.* JOHNSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 6413. BLANCHARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 13.

No. 6415. BERRY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 175, 263 N. E. 2d 487.

No. 6416. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 12.

No. 6417. BAREFIELD *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 434 F. 2d 307.

No. 6418. BATES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6422. WOODSON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. Reported below: 211 Va. 285, 176 S. E. 2d 818.

No. 6424. HOHENSEE *v.* SCIENTIFIC LIVING, INC. C. A. 4th Cir. Certiorari denied.

No. 6425. BOEHME *v.* HARRISON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 966. FLORIDA STATE BOARD OF DENTISTRY *v.* MACK. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 862.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Respondent, Dr. Roy F. Mack, was a dentist whose license to practice was revoked by the Florida State Board of Dentistry, the petitioner herein. Dr. Mack sought judicial review of the revocation proceedings in the state courts where he urged, without success, "that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial." *Mack* v. *Pepper*, 192 So. 2d 66, 67 (Fla. Dist. Ct. App. 1966), cert. denied, 201 So. 2d 551 (Fla. 1967). Mack did not seek certiorari in this Court, but instead commenced an action in federal district court seeking relief under 42 U. S. C. § 1983. He argued in the District Court that the proceedings before the State Board were unconstitutional, in that the board acted as both prosecutor and judge in his case and further in that the charges against him were not proved beyond a reasonable doubt. The District Court held for Mack on the former, although not the latter, ground. *Mack* v. *Florida State Board of Dentistry*, 296 F. Supp. 1259 (SD Fla. 1969). On appeal, the Court of Appeals rejected both grounds advanced by Mack, but nonetheless held in his favor, concluding that the procedure before the board amounted, not to a fair and impartial hearing, but to "an ungoverned confrontation" totally unlike "anything which claims to be an administrative hearing as known to the jurisprudence of this Country." *Mack* v. *Florida State Board of Dentistry*, 430 F. 2d 862, 864 (CA5 1970).

The Board of Dentistry seeks certiorari,* contending that the Court of Appeals assumed appellate jurisdiction

*Mack has also petitioned for certiorari, which we today deny, No. 963, *supra*.

over the courts of the State of Florida and violated doctrines of *res judicata* in deciding an issue—the fundamental fairness of the hearing held by the Board—which had already been decided adversely to Mack in the state courts. The Board cites *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923), and numerous lower court decisions, see, *e. g.*, *Paul* v. *Dade County*, 419 F. 2d 10 (CA5 1969), holding that a federal court may not determine constitutional issues already submitted to and determined by a state court. Indeed, *Angel* v. *Bullington*, 330 U. S. 183 (1947), which the Board does not cite, indicates that a federal court may not even decide issues which could have been but were not submitted to a state court in prior litigation.

The issue raised by petitioner is not, however, without difficulty and confusion. In *Brown* v. *Chastain*, 416 F. 2d 1012, 1014 (CA5 1969), Judge Rives argued forcefully in dissent that normal rules concerning finality of state court judgments are not always applicable in actions under § 1983, pointing out that three circuits had already opaquely suggested that position. See *Jenson* v. *Olson*, 353 F. 2d 825 (CA8 1965); *O'Connor* v. *O'Connor*, 315 F. 2d 420 (CA5 1963); *Hardy* v. *Northwestern Federal Savings & Loan Assn.*, 102 U. S. App. D. C. 371, 254 F. 2d 70 (1957). It has also been urged that a federal court should ignore the usual rules of *res judicata* when a plaintiff, who was a defendant in state court proceedings and who was thus compelled initially to present his federal claims in a state court, seeks in a federal suit to vindicate a specially protected federal interest. See Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967).

Whether § 1983 is to serve as the analogue to habeas corpus in civil cases displacing the usual rules of finality seems an important and timely issue having serious state-

federal implications. Cf. *Younger* v. *Harris, ante,* p. 37; *Boyle* v. *Landry, ante,* p. 77; *Samuels* v. *Mackell, ante,* p. 66; *Dyson* v. *Stein, ante,* p. 200; and *Perez* v. *Ledesma, ante,* p. 82. Accordingly, I dissent from the denial of certiorari in this case.

No. 6430. McNeil *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 277 N. C. 162, 176 S. E. 2d 732.

No. 6435. Finney *v.* Wainwright, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1001.

No. 6436. Mensik *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 945. Militana *v.* University of Miami. Dist. Ct. App. Fla., 3d Dist. Motions to dispense with printing petition and supplemental petition granted. Motion for leave to file supplemental petition granted. Certiorari denied. Reported below: 236 So. 2d 162.

No. 1087. Kelly, Judge *v.* Florida Judicial Qualifications Commission. Sup. Ct. Fla. Certiorari denied. Mr. Justice Douglas and Mr. Justice Marshall are of the opinion that certiorari should be granted. Reported below: 238 So. 2d 565.

No. 1090. Berger *v.* United States; and

No. 1211. Levy *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas and Mr. Justice White took no part in the consideration or decision of these petitions. Reported below: 433 F. 2d 680.

No. 1112. King *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted. Reported below: 430 F. 2d 1177.

No. 6429. EPLING, ADMINISTRATRIX *v.* M. T. EPLING CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 435 F. 2d 732.

No. 1121. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* VULCAN MATERIALS CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 430 F. 2d 446.

No. 1126. SARELAS *v.* BOARD OF MANAGERS OF THE CHICAGO BAR ASSN. Sup. Ct. Ill. Motion to dispense with printing petition granted. Certiorari denied.

No. 1146. STAMBLER ET AL. *v.* DILLON ET AL. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 1138. MICKEY ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1148. HOWARD *v.* AMERICAN MAIL LINE, LTD. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that the judgment should be reversed. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500. Reported below: 256 Ore. 568, 475 P. 2d 65.

No. 5115. LABATT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 108 Ill. App. 2d 18, 246 N. E. 2d 845.

No. 6346. MASSEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 703, 177 S. E. 2d 79.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Prior to petitioner's trial for armed robbery, the trial judge appointed a psychiatrist at petitioner's request to conduct an examination into petitioner's competency to stand trial. He apparently was found competent. At trial the State produced evidence of the robbery and an exchange of gunfire. A number of witnesses identified petitioner as the gunman. Petitioner's defense was that he had taken some pills and had drunk some alcohol prior to the robbery and remembered nothing from the time he took the pills until the time he awoke in the station house. In rebuttal the State called the examining psychiatrist who testified that petitioner had told him a very logical and complete story of what had happened during the afternoon of the robbery. The defense moved to strike the testimony on the ground that the psychiatrist-patient privilege accorded by Georgia law* barred the testimony.

The trial judge denied the motion and the Supreme Court of Georgia affirmed, stating:

> "The psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court. . . . Hence, the requisite relationship did not exist and it was not error to admit in evidence the psychiatrist's testimony as to statements made to him by the defendant during the course of

*Ga. Code Ann. § 38–418 (Supp. 1970): "There are certain admissions and communications excluded from consideration of public policy.

"Among these are: . . . 5. Psychiatrist and patient."

his examination of the defendant." 226 Ga. 703, 704–705, 177 S. E. 2d 79, 81.

This case does not present any issues relating to the question of the quantum of psychiatric aid necessary to determine competency to stand trial. Cf. *Pate* v. *Robinson*, 383 U. S. 375; *Bishop* v. *United States*, 350 U. S. 961. The issue presented is whether in keeping with the Equal Protection Clause a State can limit the psychiatrist-patient privilege to situations where the psychiatrist is not court appointed.

If every court-appointed psychiatrist is only an agent of the State, not a confidant and adviser of the accused, then the potential of using him to deprive the accused of his constitutional rights is great, as evident from *Leyra* v. *Denno*, 347 U. S. 556. In that case a state psychiatrist did what police could not do—"[A]n already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist." *Id.*, at 561.

Would not abolishing the attorney-client privilege for indigents who had court-appointed counsel violate both the Sixth and Fourteenth Amendments? Compare *Gideon* v. *Wainwright*, 372 U. S. 335, with *Douglas* v. *California*, 372 U. S. 353. If so, why is the psychiatrist-patient privilege different? Can the psychiatrist-patient privilege be constitutionally limited to those with a money relationship? Does "the kind of trial a man gets depend on the amount of money he has"? *Griffin* v. *Illinois*, 351 U. S. 12, 19.

Had petitioner been able to hire his own psychiatrist, his trial chances would not have been as abruptly crushed on rebuttal as they were here. In this posture this case is much stronger than the transcript cases (*Griffin, supra*; *Williams* v. *Oklahoma City*, 395 U. S. 458; *Roberts* v.

LaVallee, 389 U. S. 40; *Long* v. *District Court of Iowa*, 385 U. S. 192; *Draper* v. *Washington*, 372 U. S. 487); counsel on appeal (*Douglas* v. *California*, *supra*); or the fee cases (*Burns* v. *Ohio*, 360 U. S. 252; *Smith* v. *Bennett*, 365 U. S. 708). All of those dealt with post-trial review. Here the alleged denial of equal protection destroyed whatever chance petitioner had *at trial*. This is a question which ought to be decided and I would set the case for oral argument.

No. 5693. JOHNSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 27 N. Y. 2d 119, 261 N. E. 2d 644.

No. 5497. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 751. [For earlier order herein, see 400 U. S. 863.]

No. 6128. WRIGHT *v.* WOODS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 1143.

No. 6331. BERRIER *v.* UNITED STATES. C. A. 4th Cir. Motion of Christian Anti-Defamation League for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 434 F. 2d 572.

Rehearing Denied

No. 44. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* ATCHLEY, 400 U. S. 446; and

No. 861. BURTMAN ET AL. *v.* UNITED STATES, 400 U. S. 1020. Petitions for rehearing denied.

No. 869. CHRISTOPHER ET AL. *v.* E. I. DU PONT DE NEMOURS & Co., INC., 400 U. S. 1024. Petition for rehearing denied. MR. JUSTICE HARLAN and MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

MARCH 11, 1971

Dismissal Under Rule 60

No. 1280. MONTAGNA *v.* UNITED STATES. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 432 F. 2d 1119.

MARCH 17, 1971

Dismissal Under Rule 60

No. 1233. STATES MARINE LINES, INC., ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 142 U. S. App. D. C. 4, 439 F. 2d 514.

MARCH 19, 1971

Dismissal Under Rule 60

No. 6540. GARELLE *v.* UNITED STATES. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 438 F. 2d 366.

MARCH 22, 1971

Affirmed on Appeal

No. 423. ELECTRONIC INDUSTRIES ASSN. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 310 F. Supp. 1286.

No. 882. HADNOTT ET AL. *v.* AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. Appeal from D. C. M. D. Ala. Motion to dispense with printing jurisdictional statement and other relief granted. Motion of appellee Hildreth to dispense with printing motion to affirm granted. Judgment affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 320 F. Supp. 107. [For earlier order herein, see 400 U. S. 876.]

No. 1215. NEW ORLEANS BOOK MART, INC., ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. Affirmed on appeal from D. C. M. D. Fla. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 318 F. Supp. 352.

No. 6559. JOHNSON ET AL. *v.* MARSTON ET AL. Affirmed on appeal from D. C. Ariz.

Appeals Dismissed

No. 877. BERNIER *v.* MAINE ET AL. Appeal from Sup. Jud. Ct. Me. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed as moot. Reported below: 265 A. 2d 604.

No. 1168. KLATEX, INC. *v.* MOUTON, COLLECTOR OF REVENUE. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 256 La. 873, 239 So. 2d 365.

No. 1218. HAYES *v.* LIEUTENANT GOVERNOR OF HAWAII. Appeal from Sup. Ct. Hawaii dismissed as moot. Reported below: — Haw. —, 473 P. 2d 872.

No. 1187. MASTERS *v.* EXECUTOR OF ESTATE OF SMYTHE ET AL. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1190. NATIONAL LIFE & ACCIDENT INSURANCE CO. *v.* NOTTER. Appeal from Ct. Civ. App. Tex., 10th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 S. W. 2d 322.

No. 6144. QUINN *v.* CALIFORNIA. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 6457. ANDERSON ET UX. *v.* SECRETARY OF THE TREASURY ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 6476. FORD ET AL. *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1225. REPTILE PRODUCTS ASSN., INC. *v.* DIAMOND, COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 27 N. Y. 2d 182, 264 N. E. 2d 118.

Miscellaneous Orders

No. —. DOE ET AL. *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, ET AL. Motion to shorten time to docket appeal denied.

No. —. BUCKLEY ET AL. *v.* JOHNSON ET AL. Application for stay of order of United States District Court for the District of Connecticut entered in Civil Action No. 13432 on November 20, 1970, which application was presented to MR. JUSTICE HARLAN, and by him referred to the Court, granted, and said order hereby stayed pending timely filing of appeal in this Court. Should appeal be so timely filed, stay will remain in effect pending its disposition. In event appeal is dismissed, stay to terminate automatically. Should jurisdiction be noted or postponed, stay to remain in effect pending issuance of judgment of this Court. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE HARLAN are of the opinion that stay should be denied. Motion of Rita Johnson et al. to expedite appeal denied.

No. —. DONOFRIO *v.* UNITED STATES. C. A. 5th Cir. Application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

No. —. THOMPSON *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 28 ET AL. C. A. 5th Cir. Application for stay of induction presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that the stay should be granted.

No. 31, Orig. UTAH *v.* UNITED STATES. Exceptions to Report of Special Master set for oral argument in due course. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter. [For earlier actions herein, see, *e. g., ante,* p. 903.]

No. 362. MCGEE *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, 400 U. S. 864.] Motion of Richard K. LeGrande for leave to proceed *in forma pauperis* granted. Motion for authorization for payment of counsel for preparation of brief as *amicus curiae* denied.

No. 409. BOARD OF EDUCATION OF LITTLE ROCK SCHOOL DISTRICT ET AL. *v.* CLARK ET AL. C. A. 8th Cir. Application for stay restraining petitioners from continuing any construction at Henderson Junior High School in Little Rock, Arkansas, pending final disposition of all issues presented in case No. 20485 now pending before the United States Court of Appeals for the Eighth Circuit, which application was presented to MR. JUSTICE BLACK, and by him referred to the Court, granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application. Reported below: 426 F. 2d 1035.

No. 557. UNITED STATES *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. Certified appeal from S. D. Ohio. [Probable jurisdiction noted, 400 U. S. 990.] Motion of the Solicitor General for leave for John F. Dienelt to present oral argument *pro hac vice* granted.

No. 1081. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* AFFELDT ET UX. Appeal from D. C. N. D. Ind. Application for stay of judgment of District Court presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 319 F. Supp. 69.

No. 5586. BELL *v.* BURSON, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF GEORGIA. Ct. App. Ga. [Certiorari granted, 400 U. S. 963.] Motion of Elizabeth Roediger Rindskopf for leave to argue *pro hac vice* on behalf of petitioner granted.

No. 1178. PIPER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE ET AL.;

No. 6329. RABB *v.* UNITED STATES;

No. 6477. SORRELLS *v.* UNITED STATES; and

No. 6539. MCCRAY *v.* MARYLAND. Motions for leave to file petitions for writs of mandamus denied.

No. 6263. NORMAN *v.* CARLSON, DIRECTOR OF BUREAU OF PRISONS, ET AL.;

No. 6450. COAKLEY *v.* PERINI, CORRECTIONAL SUPERINTENDENT, ET AL.;

No. 6462. MCCLINDON *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL.;

No. 6509. IN RE ORTEGA;

No. 6513. TAYLOR *v.* CALIFORNIA ET AL.;

No. 6580. HOOD *v.* TENNESSEE ET AL.; and

No. 6639. JAMES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6448. KAZUBOWSKI *v.* JOHNSON, SHERIFF. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 6377. GUY *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 1220. DOWDY *v.* THOMSEN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Postponed

No. 1232. ROUDEBUSH *v.* HARTKE ET AL.; and

No. 1236. SENDAK, ATTORNEY GENERAL OF INDIANA *v.* HARTKE ET AL. Appeals from D. C. S. D. Ind. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 321 F. Supp. 1370.

Certiorari Granted—Vacated and Remanded. (See No. 1059, *ante*, p. 486.)

Certiorari Granted

No. 883. UNITED STATES *v.* GENERES ET VIR. C. A. 5th Cir. Certiorari granted. Reported below: 427 F. 2d 279.

No. 1159. SUPERINTENDENT OF INSURANCE OF NEW YORK *v.* BANKERS LIFE & CASUALTY CO. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 430 F. 2d 355.

No. 1162. SECURITIES AND EXCHANGE COMMISSION *v.* MEDICAL COMMITTEE FOR HUMAN RIGHTS. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 139 U. S. App. D. C. 226, 432 F. 2d 659.

No. 1184. NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.; and

No. 1231. TEXAS STATE TILE & TERRAZZO CO., INC., ET AL. *v.* PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. Motion of Building & Construction Trades Department, AFL–CIO, for leave to file a brief as *amicus curiae* granted. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 142 U. S. App. D. C. 146, 440 F. 2d 174.

No. 5515. HUMPHREY *v.* CADY, WARDEN. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

No. 5703. JACKSON *v.* INDIANA. Sup. Ct. Ind. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: —— Ind. ——, 255 N. E. 2d 515.

No. 6073. BRITT *v.* NORTH CAROLINA. Ct. App. N. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 8 N. C. App. 262, 174 S. E. 2d 69.

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Certiorari Denied. (See also Nos. 1187, 1190, 6144, 6457, and 6476, *supra.*)

No. 878. PARKIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 238 So. 2d 817.

No. 1154. HALDE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA. Sup. Ct. Cal. Certiorari denied.

No. 1156. NEUMAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 131, 436 F. 2d 285.

No. 1157. KAUFFMAN ET AL. *v.* DREYFUS FUND, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 434 F. 2d 727.

No. 1158. ABBETT, SOMMER & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 1160. DEVAL AERODYNAMICS, INC., ET AL. *v.* EULO. C. A. 3d Cir. Certiorari denied. Reported below: 430 F. 2d 325.

No. 1161. GARNER ET AL. *v.* FIRST AMERICAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 1093.

No. 1167. HESTER ET AL. *v.* WYCHE. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 791.

No. 1169. G. P. D., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 963.

No. 1170. FARKAS *v.* TEXAS INSTRUMENTS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 2d 849.

No. 1172. SECURITY MUTUAL CASUALTY CO. *v.* FIRST NATIONAL BANK OF CUSHING ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 1025.

No. 1173. PEACOCK RECORDS, INC., ET AL. *v.* CHECKER RECORDS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 85.

No. 1174. UNITED TRANSPORTATION UNION, LOCAL LODGE NO. 31 *v.* ST. PAUL UNION DEPOT CO. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 220.

No. 1176. BARZIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 984.

No. 1177. BASS, ADMINISTRATOR *v.* TEXAS POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 763.

No. 1180. ADAMS POTATO CHIPS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 430 F. 2d 90.

No. 1181. TURZYNSKI *v.* LIBERT. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 2d 352, 259 N. E. 2d 295.

No. 1185. FIRESTONE TIRE & RUBBER CO. *v.* GENERAL TIRE & RUBBER CO. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 1199.

No. 1188. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* BUTLER. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 77.

No. 1192. NEW YORK CENTRAL RAILROAD CO., NOW PENN CENTRAL TRANSPORTATION CO. *v.* FISHER, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied.

No. 1198. LENIT ET AL. *v.* POWERS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 1196. LEVERING *v.* LEVERING. Sup. Ct. Del. Certiorari denied. Reported below: — Del. —, 271 A. 2d 42.

No. 1200. IRVIN INDUSTRIES, INC. *v.* AMERICAN HARLEY CORP. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 168, 263 N. E. 2d 552.

No. 1201. TUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1017.

No. 1202. BOARD OF TRUSTEES OF THE SOCIAL SECURITY FUND OF THE DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, AFL–CIO *v.* FARRELL. Sup. Ct. Pa. Certiorari denied. Reported below: 440 Pa. 255, 269 A. 2d 890.

No. 1203. MCGEE ET AL. *v.* HORN. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 1375.

No. 1206. VAUGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 124.

No. 1208. RODRIGUEZ-ROMERO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 1022.

No. 1210. TECHNICAL DEVELOPMENT CORP. ET AL. *v.* BECKMAN INSTRUMENTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 433 F. 2d 55.

No. 1214. WOOD *v.* JOHNSTON BRONZE CO. Sup. Ct. Ohio. Certiorari denied.

No. 1217. LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 430 F. 2d 1225.

No. 1235. DEANGELIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1221. CATALDO *v.* UNITED STATES; and

No. 6212. LUCAS, AKA LUCAKOS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 38.

No. 1222. IRVING J. DORFMAN CO., INC. *v.* THOMAS WILSON & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 409.

No. 1223. COOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1244. FOLEY ET UX. *v.* COMPTROLLER OF THE TREASURY OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 259 Md. 330, 269 A. 2d 807.

No. 5924. SHORTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 5954. NELSON *v.* WEST VIRGINIA. Intermediate Ct. W. Va., Kanawha County. Certiorari denied.

No. 6099. HOGAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 235 So. 2d 704.

No. 6111. APPLING *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6113. JONES ET AL. *v.* SULLIVAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 433 F. 2d 576.

No. 6174. LOWTHER *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6197. STULLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 10 Cal. App. 3d 582, 89 Cal. Rptr. 158.

No. 6335. LEANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6338. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 1266.

No. 6343. HARRIS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: — Tenn. App. —, 457 S. W. 2d 370.

No. 6353. BUJESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 46.

No. 6366. BUTLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 2d 243.

No. 6373. GRUCA *v.* SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 85, 436 F. 2d 239.

No. 6411. HOSMER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 2d 209.

No. 6419. STEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 6423. MONTEIRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 6432. DEPUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 548.

No. 6434. LOWERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 1171.

No. 6439. BATTAGLIA *v.* CIVIL SERVICE COMMISSION. Sup. Ct. App. Va. Certiorari denied.

No. 6441. TILLI *v.* COUNTY OF NORTHAMPTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 6443. GARDNER *v.* SHEARSON, HAMMILL & Co. C. A. 5th Cir. Certiorari denied.

No. 6444. KOSHIOL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 573, 262 N. E. 2d 446.

No. 6449. ERICKSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6446. JAMES *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 2d 708.

No. 6454. GRADY *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 6455. MINKEL *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 6460. PRICE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6461. PARROTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 434 F. 2d 294.

No. 6463. CUNNINGHAM *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6465. DALTO *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 1018.

No. 6466. STANDLEY *v.* CONTE. Sup. Ct. Wash. Certiorari denied.

No. 6468. FAHRIG *v.* YOUNG ET AL. C. A. 6th Cir. Certiorari denied.

No. 6473. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 6478. JONES *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied.

No. 6480. MUELLER *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 6487. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 438 F. 2d 301.

No. 6488. BOTICA *v.* BRANTLEY, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 6489. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 795.

No. 6490. HUNTER *v.* LOCHER ET AL. C. A. 6th Cir. Certiorari denied.

No. 6492. MCCLARY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 6493. WARD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6494. GEARING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 1038.

No. 6498. VITAL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6501. SPRINGLE *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 1380.

No. 6503. SELLERS *v.* DIXILYN CORP. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 446.

No. 6504. SALVI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 6507. DARBY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 6510. COOKMEYER *v.* LOUISIANA DEPARTMENT OF HIGHWAYS. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 386.

No. 6522. TRACY ET UX. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 6524. STRONG *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 6537. STEVENSON *v.* MANCUSI, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 6551. DESONIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1290.

No. 6587. VICTOR *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 57 N. J. 210, 271 A. 2d 5.

No. 6626. DI GIANGIEMO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1102. DI GIAMBERARDINO *v.* NEW JERSEY. Super. Ct. N. J. Motion to dispense with printing petition granted. Certiorari denied.

No. 1204. HAIFLEY *v.* UNITED STATES. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 432 F. 2d 1064.

No. 1134. NOONAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 434 F. 2d 582.

No. 1163. DASH ET AL. *v.* COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 427.

No. 1179. SELLERS ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 493.

No. 1186. MESCALERO APACHE TRIBE ET AL. *v.* RUSSELL, ACTING SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 956.

No. 1212. CHAHOC ET AL. *v.* HUNT SHIPYARD, A DIVISION OF HUNT TOOL CO., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 576.

No. 1224. DANIELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 834.

No. 6089. GROHMAN *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 258 Md. 552, 267 A. 2d 193.

No. 6538. AIKEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 226 Ga. 840, 178 S. E. 2d 202.

No. 1147. WEISSMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 434 F. 2d 175.

No. 1164. YAHR ET AL. *v.* RESOR, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 431 F. 2d 690.

No. 1171. LOS ANGELES FREE PRESS, INC. *v.* CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 9 Cal. App. 3d 448, 88 Cal. Rptr. 605.

No. 1213. SCHIPANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 435 F. 2d 26.

No. 1238. MANCUSI, WARDEN, ET AL. *v.* MARTINEZ. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 443 F. 2d 921.

No. 5999. HOWARD *v.* CRAVEN, WARDEN, ET AL. Super. Ct. Cal., County of Sacramento. Certiorari and/or habeas corpus denied.

No. 6110. MAGEZIS ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would deny petition on ground that state remedies have not been exhausted. Reported below: 3 Cal. 3d 54, 473 P. 2d 353.

No. 6239. THERIAULT *v.* DAGGETT, ACTING WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 6247. THERIAULT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 6426. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 428 F. 2d 515.

No. 6279. FALGOUT *v.* PATTERSON, WARDEN. C. A. 10th Cir. Application for bail presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

No. 6433. MOORE *v.* INDIANA ET AL. C. A. 7th Cir. Motion for leave to amend petition for certiorari granted. Certiorari denied.

No. 6525. DEXTER *v.* INDIANA. C. A. 7th Cir. Motion for leave to amend petition for certiorari granted. Certiorari denied.

No. 6452. LUCAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Rehearing Denied

No. 5796. GREENE *v.* UNITED STATES, 400 U. S. 965. Petition for rehearing denied.

No. 806. UNITED SERVICES AUTOMOBILE ASSN. *v.* UNITED STATES ET AL., 400 U. S. 992; and

No. 6032. WILLIAMS *v.* NEIL, WARDEN, 400 U. S. 1011. Motions for leave to file petitions for rehearing denied.

MARCH 29, 1971

Affirmed on Appeal

No. 31. CATO ET AL. *v.* GEORGIA ET AL. Affirmed on appeal from D. C. N. D. Ga. *Stefanelli* v. *Minard*, 342 U. S. 117, and *Perez* v. *Ledesma*, *ante*, p. 82. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 302 F. Supp. 1143.

No. 112. LECLAIR ET AL. *v.* O'NEIL ET AL. Affirmed on appeal from D. C. Mass. *Younger* v. *Harris*, *ante*, p. 37; *Samuels* v. *Mackell*, and *Fernandez* v. *Mackell*, *ante*, p. 66. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 307 F. Supp. 621.

No. 217. JOHNNIE REB'S BOOK & CARD SHOP ET AL. *v.* SLATON ET AL. Affirmed on appeal from D. C. N. D. Ga. *Younger* v. *Harris, ante,* p. 37; and *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS dissents from affirmance. Reported below: See 226 Ga. 171, 175 S. E. 2d 539.

No. 5462. PORTER *v.* KIMZEY ET AL. Affirmed on appeal from D. C. N. D. Ga. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS dissents from affirmance. Reported below: 309 F. Supp. 993.

No. 5952. GEIGER *v.* JENKINS ET AL. Affirmed on appeal from D. C. N. D. Ga. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. Reported below: 316 F. Supp. 370.

No. 236. CAMPBELL, COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL. *v.* LEWIS. Affirmed on appeal from C. A. 5th Cir. *Campbell* v. *Hussey,* 368 U. S. 297. MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 425 F. 2d 77.

No. 1250. STARNS ET AL. *v.* MALKERSON ET AL. Affirmed on appeal from D. C. Minn. MR. JUSTICE WHITE is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 326 F. Supp. 234.

No. 5412. BROWN *v.* FALLIS, DISTRICT ATTORNEY OF TULSA COUNTY, ET AL. Appeal from D. C. N. D. Okla. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment affirmed, *Younger* v. *Harris, ante,* p. 37. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 311 F. Supp. 548.

No. 1266. BARTLETT ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: See 297 F. Supp. 1061.

Appeals Dismissed

No. 1275. ORIENTAL BOULEVARD CO. ET AL. *v.* HELLER, COMMISSIONER OF DEPARTMENT OF AIR POLLUTION CONTROL, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 27 N. Y. 2d 212, 265 N. E. 2d 72.

No. 1282. MALINOU *v.* BOARD OF ELECTIONS OF RHODE ISLAND ET AL. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question. Reported below: — R. I. —, 271 A. 2d 798.

No. 1284. BALC *v.* PARSONS ET AL. Appeal from Sup. Ct. Ohio. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 6442. HERNANDEZ *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 27 N. Y. 2d 811, 264 N. E. 2d 357.

Vacated and Remanded on Appeal

No. 90. BARLOW ET AL. *v.* GALLANT ET AL. Appeal from D. C. W. D. Tex. Motion of appellees Morris and Walters for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37. MR. JUSTICE DOUGLAS would note probable jurisdiction and affirm the judgment.

No. 43. SHEVIN ET AL. *v.* LAZARUS. Appeal from D. C. S. D. Fla. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37. MR. JUSTICE DOUGLAS would note probable jurisdiction and affirm the judgment. Reported below: 301 F. Supp. 266. [For earlier order herein, see 400 U. S. 924, *sub nom. Faircloth* v. *Lazarus.*]

No. 102. GOODMAN ET AL. *v.* WHEELER ET AL. Appeal from D. C. W. D. N. C. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37. MR. JUSTICE DOUGLAS would note probable jurisdiction and affirm the judgment. Reported below: 306 F. Supp. 58.

No. 116. MCGREW ET AL. *v.* CITY OF JACKSON ET AL. Appeal from D. C. S. D. Miss. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 307 F. Supp. 754.

No. 134. HOSEY ET AL. *v.* CITY OF JACKSON ET AL. Appeal from D. C. S. D. Miss. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 309 F. Supp. 527.

No. 484. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY *v.* P. B. I. C., INC., ET AL. Appeal from D. C. Mass. Judgment vacated and case remanded to consider question of mootness. Reported below: 313 F. Supp. 757.

No. 844. ABC Books, Inc., et al. *v.* Benson, Commissioner of Revenue of Tennessee, et al. Appeal from D. C. M. D. Tenn. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris*, *ante*, p. 37; *Samuels* v. *Mackell*, and *Fernandez* v. *Mackell*, *ante*, p. 66. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 315 F. Supp. 695.

No. 5164. Dyches *v.* Ryan et al. Appeal from D. C. S. D. Ga. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris*, *ante*, p. 37; *Samuels* v. *Mackell*, and *Fernandez* v. *Mackell*, *ante*, p. 66. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 888. Board of Public Instruction of Dade County *v.* Banks. Appeal from D. C. S. D. Fla. Judgment vacated and case remanded so that a fresh decree may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Fifth Circuit if appellant so chooses. Reported below: 314 F. Supp. 285.

No. 5013. Rollins et al. *v.* Shannon. Appeal from D. C. E. D. Mo. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris*, *ante*, p. 37; *Samuels* v. *Mackell*, and *Fernandez* v. *Mackell*, *ante*, p. 66; and *Boyle* v. *Landry*, *ante*, p. 77. Mr. Justice Douglas concurs on basis of his separate opinion in *Samuels* v. *Mackell*, and *Fernandez* v. *Mackell*, *ante*, p. 74. Reported below: 292 F. Supp. 580.

No. 289. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY *v.* BUCHANAN ET AL.; and

No. 290. BUCHANAN ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeals from D. C. N. D. Tex. Motion of North American Conference of Hemophile Organizations for leave to file a brief as *amicus curiae* in No. 290 granted. Judgment vacated and cases remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS is of the opinion that No. 289 should be dismissed as untimely filed and that probable jurisdiction should be noted in No. 290. Reported below: 308 F. Supp. 729.

Certiorari Granted—Reversed or Vacated, and Remanded

No. 20. WRIGHT ET AL. *v.* CITY OF MONTGOMERY, ALABAMA, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and judgment reversed. Reported below: 406 F. 2d 867.

No. 5539. EMBRY ET AL. *v.* ALLEN ET AL. C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, and judgment reversed and remanded. *Younger* v. *Harris, ante,* p. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell, ante,* p. 66. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted, judgment vacated, and case remanded for reconsideration in light of above-cited cases. MR. JUSTICE DOUGLAS dissents from reversal. Reported below: 422 F. 2d 1158.

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No. 500. FERDON ET AL. *v.* DEMICH, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Perez* v. *Ledesma, ante,* p. 82. MR. JUSTICE DOUGLAS is of the opinion that the judgment should be affirmed. Reported below: 426 F. 2d 643.

Miscellaneous Orders

No. ——. GREGORY ET AL. *v.* TARR, NATIONAL DIRECTOR OF SELECTIVE SERVICE SYSTEM, ET AL. C. A. 6th Cir. Application for recall of mandate and stay of mandate of United States Court of Appeals for the Sixth Circuit heretofore granted by MR. JUSTICE STEWART pending further order of Court, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would extend stay granted by MR. JUSTICE STEWART. Reported below: 436 F. 2d 513.

No. 1028. UNITED STATES *v.* CAMPOS-SERRANO. C. A. 7th Cir. [Certiorari granted, *ante,* p. 936.] Motions of respondent for leave to proceed *in forma pauperis* and for appointment of counsel granted. It is ordered that John J. Cleary, Esquire, of Chicago, Illinois, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 1262. WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* BODDIE ET AL. Appeal from C. A. 2d Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 434 F. 2d 1207.

No. 1269. SWANK, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID *v.* RODRIGUEZ ET AL. Appeal from D. C. N. D. Ill. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 318 F. Supp. 289.

No. 1184. NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.; and

No. 1231. TEXAS STATE TILE & TERRAZZO CO., INC., ET AL. *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 973.] Motion of Laborers' International Union of North America, AFL–CIO, for leave to file a brief as *amicus curiae* in No. 1184 granted. Motion of Associated General Contractors of America et al. for leave to file a brief as *amici curiae* granted.

No. 6553. JEFFERSON ET AL. *v.* HACKNEY, COMMISSIONER OF PUBLIC WELFARE, ET AL. Appeal from D. C. N. D. Tex. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 5275. AUSTIN *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted or Postponed

No. 538. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. Motion to dispense with printing jurisdictional statement granted. Probable jurisdiction noted. Reported below: 314 F. Supp. 1091.

No. 814. SOCIALIST LABOR PARTY ET AL. *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL.; and

No. 1104. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* SWEETENHAM ET AL. Appeals from D. C. S. D. Ohio. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 318 F. Supp. 1262.

No. 1288. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange. Probable jurisdiction noted.

No. 1292. MOOSE LODGE No. 107 *v.* IRVIS ET AL. Appeal from D. C. M. D. Pa. Probable jurisdiction postponed to hearing of case on the merits. Reported below: 318 F. Supp. 1246.

Certiorari Granted

No. 127. D. H. OVERMYER CO., INC., OF OHIO ET AL. *v.* FRICK CO. Ct. App. Ohio, Lucas County. Certiorari granted.

No. 1278. FEDERAL TRADE COMMISSION *v.* SPERRY & HUTCHINSON CO. C. A. 5th Cir. Certiorari granted. Reported below: 432 F. 2d 146.

No. 6046. LEGO *v.* TWOMEY, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 as set forth in the petition, which reads as follows:

"1. Was the Illinois evidentiary rule for determining the voluntariness of extra-judicial confessions so highly unreliable as to contravene the Appellant's Fourteenth Amendment Due Process rights and, necessarily, deprive the Appellant of the Fifth Amendment right against self-incrimination because:

"(a) The trial judge in his preliminary determination, removed from the jury, need not find the confession voluntary beyond reasonable doubt when judging its admissibility as evidence for the jury; and,

"(b) The defendant, as a matter of Illinois law, was precluded from having the jury instructed upon, and to determine the voluntariness of the confession along with the other factual issues upon which the jury verdict must rest?"

No. 1183. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO *v.* PREPMORE APPAREL, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 431 F. 2d 1004.

No. 1285. UNITED STATES *v.* BASS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 434 F. 2d 1296.

Certiorari Denied. (See also Nos. 1284 and 6442, *supra.*)

No. 1205. FORD *v.* WISCONSIN REAL ESTATE EXAMINING BOARD. Sup. Ct. Wis. Certiorari denied. Reported below: 48 Wis. 2d 91, 179 N. W. 2d 786.

No. 1237. WOLFE *v.* UNITED STATES; and
No. 6431. HOLSTEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 144.

No. 1240. DIBARTOLO *v.* UNITED STATES;
No. 6485. PANICCIOLI *v.* UNITED STATES; and
No. 6486. FIADINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1241. KRAMER *v.* BETTER BUSINESS BUREAU OF LOS ANGELES, LTD., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1247. MEAGHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 439 Pa. 532, 266 A. 2d 684.

No. 1251. SOUTHLAND INC. *v.* COX ENTERPRISES, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 794 and 798, 177 S. E. 2d 653 and 655.

No. 1258. UNITED AIRCRAFT CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 1198.

No. 1256. STIFEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 433 F. 2d 431.

No. 1260. STATE OF ISRAEL *v.* THE NILI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 242.

No. 1261. ALTMAN *v.* STOCKTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 946.

No. 1263. NEW YORK STOCK EXCHANGE *v.* THILL SECURITIES CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 433 F. 2d 264.

No. 1264. GIBBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 621.

No. 1268. DELANO, INC. *v.* ARNOLD. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 492, 263 N. E. 2d 830.

No. 1271. DAVIS ET AL. *v.* NEWS ET AL. C. A. 2d Cir. Certiorari denied.

No. 1283. VIRDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 1205.

No. 6184. MCGUANE *v.* CHENANGO COURT, INC. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 2d 1189.

No. 6225. RICHESON *v.* HORNSTEIN, DBA ROGERS DISCOUNTLAND, ET AL. Cir. Ct. Macon County, Ill. Certiorari denied.

No. 6305. BREWER *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 431 F. 2d 1371.

No. 6311. MITCHELL *v.* CARDWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 24 Ohio St. 2d 30, 262 N. E. 2d 862.

No. 6471. BOWLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 26, 439 F. 2d 536.

No. 6475. GOMEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 2d 653.

No. 6479. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6481. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 642.

No. 6483. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6496. HARRINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 6516. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 433 F. 2d 626.

No. 6528. TAYLOR *v.* JOHNSON, SHERIFF. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 103, 264 N. E. 2d 198.

No. 6541. HICKMAN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 6544. ANTONSON *v.* VIRGINIA A. B. C. BOARD ET AL. Sup. Ct. App. Va. Certiorari denied.

No. 6545. LOMAX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6547. ZENOR *v.* VOGT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 189.

No. 6548. EATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 6552. CORDLE *v.* MOYNAHAN, JUDGE. C. A. 6th Cir. Certiorari denied.

No. 1166. COOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1093.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

I would grant the petition on the issue of electronic surveillance.

In this criminal prosecution counsel for the defense asked if the Government had obtained any evidence by means of listening devices or electronic eavesdropping.[1] The prosecutor would say only that "no illegal eavesdropping devices were used."[2] He would not state whether any eavesdropping equipment had been used.[3] The trial judge refused to order the disclosure.[4]

On appeal, petitioner contended that the Government must disclose whether there had been electronic surveillance, regardless of its views on the legality. The legality

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[1] Defense counsel gave as his reason: "For example, on cross examination there was some question about a conversation, a phone conversation that the defendant had."

[2] "[W]e are not going to make it a practice in our office to show the Court during each trial what eavesdropping devices we used, because on its face it might be illegal."

"I don't think that we have to commit ourselves in any case and say, 'Judge, since it might be illegal, we did not use it,' so that we can make a record."

[3] "I represent only to your Honor in this case, and we will in other cases, that there was nothing illegal about any of the evidence we presented, no illegal eavesdropping devices were used, and I don't think that I have to tell defense counsel whether or not we used eavesdropping equipment."

[4] "[T]hey have sort of a practice that the one who is honored to reveal these things has been left to the Solicitor General of the United States. I know of no district attorney that has made a disclosure yet. They either make it in the Supreme Court or they make it in the Seventh Circuit, but we haven't got down to the lower echelon yet where that has been disclosed even by the Solicitor General."

of such surveillance was for the court to determine, he argued, and he asked for a hearing to determine if such devices were used.[5] The Government asserted on appeal that "there was no electronic surveillance involved in this case." This statement was supported by a letter from the Department of Justice:

> "Please be informed we have contacted the appropriate investigative agencies and have been informed Cook was *not* the subject of a direct microphone surveillance nor were any of his conversations monitored. Further, we are informed, no electronic surveillance was maintained on premises which were known to have been owned, leased, or licensed by the above individual."

Petitioner contended that this letter was far from clear as it did not state which agencies were contacted and only stated that he was not the subject of "direct" microphone surveillance, suggesting "indirect" surveillance. The Court of Appeals agreed that the statement of the prosecutor was "not unequivocal," 432 F. 2d 1093, 1109, and that the disclosure should have been made to the trial judge. Yet it affirmed the conviction without further inquiry.

Petitioner contends that he is entitled to a judicial determination of the existence and legality of electronic eavesdropping. He argues that the United States has never stated unequivocally that no electronic eavesdropping occurred. The Solicitor General relies on the letter which I have quoted. Moreover, he indicates that the

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[5] "While defendant takes the position that disclosure in open court is the constitutionally preferred procedure, he submits at the same time that an *in camera* determination of legality or illegality was required as an absolute constitutional minimum under the Fourth Amendment." (Brief for Defendant-Appellant in CA7, pp. 62–63.)

procedure followed below is in accordance with "statutory procedures now provided with respect to claims of illegal electronic surveillance in proceedings occurring after October 15, 1970 . . . ." From now on, the United States will not even review its files to determine the existence of evidence stemming from electronic surveillance unless the defendant meets the "burden of raising any issue of illegal electronic surveillance . . . ."

The Omnibus Crime Control and Safe Streets Act of 1968, § 802, 82 Stat. 212, 18 U. S. C. §§ 2510–2520 (1964 ed., Supp. V), provides for electronic surveillance either on warrants issued by a magistrate, § 2516, or on the sole initiative of the designee of the Attorney General who "reasonably determines" that there is "an emergency situation" respecting "conspiratorial activities" which threaten the national security or which involve "organized crime." § 2518 (7). The officer must apply for an order approving the interception within 48 hours, complying with procedures for obtaining an order of authorization. If the application is denied, or approval is not issued before the interception is terminated, the contents of any intercepted communication are to be treated as illegally obtained. § 2518 (7).

The Act sanctions free use of intercepted information among investigative personnel, § 2517 (1). It also widely protects "evidence derived therefrom," §§ 2517 (1), (2), and (3), including the giving of testimonial evidence.[6] But any person whose "wire or oral communication is intercepted, disclosed, or used" in violation of the ways I have enumerated has suit for actual and punitive damages and reasonable attorneys' fees and costs. § 2520.

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[6] There is the initial question whether any intercepted communications relating to the offense of which petitioner was convicted are evidence of "offenses other than those specified in the order of authorization or approval," § 2517 (5). If so, "[s]uch contents and any evidence derived therefrom may be used [as testimony at trial]

The issue of "illegality" raised by the Government's defense would raise a myriad of questions depending on the facts. They would pertain to the question of whether the showing required by § 2518 (1) of the Act had been made to the magistrate and raise the basic question whether, if a magistrate issued a warrant, there was "probable cause," § 2518 (3). If there were a warrant, the question would also be whether the "search" was confined to the person, place, and time which were authorized. §§ 2518 (4), (5). If there were no warrant but only the action of the Attorney General under § 2518 (7), a host of different questions would be raised on the issue of "illegality."

These are new questions not yet decided under the new Act. They are important questions involving high matters of policy. They will affect many cases. It is appropriate that we reach the questions here and now, so that the procedures to be used in protecting the rights of the citizen and confining the prosecution within constitutional bounds be resolved.

While *Alderman* v. *United States*, 394 U. S. 165, was pending here, it was revealed that the United States had engaged in wiretapping which may have violated the Fourth Amendment and tainted the convictions of petitioner. We had earlier refused to accept "the ex parte determination" of the issues by the Department of Justice, *Kolod* v. *United States*, 390 U. S. 136, 137, and in *Alderman* worked out the procedures whereby the District Court would determine whether the evidence obtained was "the product of illegal surveillance." 394 U. S., at 168. The questions in that case concerned the

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when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter." This would seem to place upon the Government the burden of knowing the source of its evidence, even without challenge from a defendant.

use of "evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures." *Id.*, at 176. That is the question here and it is obviously not controlled by administrative practice or the Omnibus Crime Control and Safe Streets Act, both of which are subordinate to the Constitution.

The procedure to be designed here is not relevant only to criminals.

Electronic surveillance is today common and pervasive, as we know from reports filed pursuant to § 2519 (3) of the Act [7] and from various Senate and House investiga-

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[7] The number of reported interceptions of communications made pursuant to the Act indicates the problem is not small. In the last six months of 1968 there were 174 authorizations issued, all to state officers. One hundred forty-seven devices were installed. The average period of time authorized was 20 days. There were 128 extensions, averaging 20 days. Approximately 4,312 persons were involved in 66,716 intercepted communications. One hundred twenty-six intercepts were in dwellings and 45 were in business establishments. Based on Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period June 20, 1968, to December 31, 1968, Administrative Office of the United States Courts.

In 1969, the pace did not perceptibly diminish.

	Total	Federal	State
Number of applications	304	34	270
Authorizations issued	302	33	269
Average length of Authorization	26 days	16 days	—
Extensions granted	194	11	183
Average length of extension	22 days	14 days	—
Total period authorized	9,019 days	462 days	8,557 days
Number of devices installed	271	30	241
Telephone wiretap	250	27	223
Listening device	15	1	14
Both	6	2	4

[*Footnote 7 continued on p. 1001*]

tions, including the one being conducted by Senator Ervin.[8] These invasions of privacy apparently touch not only criminals but also reputable people whose only offense is political, social, or ideological nonconform-

	Total	Federal	State
Facility or place authorized in application			
Residence	135	10	125
Apartment	68	7	61
Multiple dwelling	14	3	11
Business establishment	71	10	61
Business & living quarters	5	2	3
Other	9	1	8
Average number of intercepts per authorized device	641	1,498	—
Average number of persons involved per wiretap	116	152	—
Total number of intercepts (approx.)	178,300	44,900	133,300
Total number of persons involved (approx.)	13,400	4,560	8,880

Based on Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Comunications for the Period January 1, 1969, to December 31, 1969, Administrative Office of the United States Courts.

What number of interceptions are made in cases which involve the so-called "national security" is not known.

[8] See Hearings on the Computer and Invasion of Privacy before a Subcommittee of the House Committee on Government Operations, 89th Cong., 2d Sess. (1966); Address of Cong. Gallagher, Technology and Society: A Conflict of Interest?, 115 Cong. Rec. 8239; Privacy and the National Data Bank Concept, H. R. Rep. No. 1842, 90th Cong., 2d Sess. (1968); Hearings, pursuant to S. Res. 39, on Invasions of Privacy (Government Agencies) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 2 (1965). The hearings being conducted by Senator Ervin before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary have not as yet been concluded.

ity. As stated in A. Westin, Privacy and Freedom 365–366 (1967):

> "As of the 1960's, the new surveillance technology is being used widely by government agencies of all types and at every level of government, as well as by private agents for a rapidly growing number of businesses, unions, private organizations, and individuals in every section of the United States."

No. 6560. OSBORN *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6564. BELLEW *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied. Reported below: 459 S. W. 2d 351.

No. 6572. SCHUTZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 2d 25.

No. 6575. CAMPBELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 883, 178 S. E. 2d 257.

No. 6598. YODER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6619. BUCKLEY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 409.

No. 834. MAYFIELD *v.* VIRGINIA. Sup. Ct. App. Va. Motions to dispense with printing petition and reply brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 874. BREWER, WARDEN *v.* BLANCHARD. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 429 F. 2d 89.

No. 1197. PASSAIC COUNTY BAR ASSN. ET AL. *v.* HUGHES, GOVERNOR OF NEW JERSEY, ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BLACKMUN is of the opinion that certiorari should be granted.

No. 1226. MERCADO *v.* SUPERIOR COURT OF PUERTO RICO ET AL. Sup. Ct. P. R. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: —— P. R. R. ——.

No. 1227. HOUSING AUTHORITY OF THE CITY OF DURHAM, NORTH CAROLINA, ET AL. *v.* CAULDER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 433 F. 2d 998.

No. 1249. OVERTON *v.* RIEGER. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1253. HUMBLE OIL & REFINING CO. *v.* SUN OIL CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 1119.

No. 1255. MARCELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 436 F. 2d 1221.

No. 6370. BLANTON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: —— Ark. ——, 458 S. W. 2d 373.

No. 6543. DARDEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 441 Pa. 41, 271 A. 2d 257.

Rehearing Denied

No. 1686, Misc., October Term, 1969. DELESPINE *v.* BETO, CORRECTIONS DIRECTOR, 397 U. S. 1030. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 949. RUBINO *v.* UNITED STATES, *ante*, p. 910;

No. 5537. FURGISON *v.* IOWA, 400 U. S. 994;

No. 6007. HALLEY *v.* UNITED STATES ET AL., *ante*, p. 905;

No. 6118. HALLEY *v.* UNITED STATES, *ante*, p. 916; and

No. 6074. CURTIS *v.* UNITED STATES, *ante*, p. 915. Petitions for rehearing denied.

No. 714. ZEZOFF *v.* UNITED STATES, 400 U. S. 957. Motion to dispense with printing motion for leave to file petition for rehearing granted. Motion for leave to file petition for rehearing denied.

APRIL 5, 1971

Affirmed on Appeal

No. 1252. PRATZ ET AL. *v.* LOUISIANA POLYTECHNIC INSTITUTE ET AL. Affirmed on appeal from D. C. W. D. La. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that the question of jurisdiction should be postponed to hearing on the merits and case set for oral argument. Reported below: 316 F. Supp. 872.

Appeals Dismissed

No. 1229. SHIPYARD DRIVE-IN THEATRE, INC., ET AL. *v.* SCUNCIO ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed. Reported below: — R. I. —, 268 A. 2d 820.

No. 1313. BERRY *v.* AETNA CASUALTY & SURETY CO. ET AL. Appeal from Ct. App. La., 2d Cir. Motion of Arthur Cobb and Louisiana Trial Lawyers Assn. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 240 So. 2d 243.

No. 1330. HUNTINGTON NATIONAL BANK OF COLUMBUS *v.* KOSYDAR, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 23 Ohio St. 2d 131, 263 N. E. 2d 227.

No. 1323. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* APACHE COUNTY ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 106 Ariz. 356, 476 P. 2d 657.

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Vacated and Remanded on Appeal

No. 422. UNITED STATES *v.* McFADDEN. Appeal from D. C. N. D. Cal. Judgment vacated and case remanded for reconsideration in light of *Gillette* v. *United States*, and *Negre* v. *Larsen*, *ante*, p. 437. MR. JUSTICE DOUGLAS dissents. Reported below: 309 F. Supp. 502.

No. 1326. SMITH, GOVERNOR OF TEXAS, ET AL. *v.* GARZA ET AL. Appeal from D. C. W. D. Tex. Judgment vacated and case remanded so that the District Court may enter a fresh judgment from which a timely appeal may be taken to United States Court of Appeals for the Fifth Circuit if appellants so choose. *Gunn* v. *University Committee to End the War in Vietnam*, 399 U. S. 383 (1970). MR. JUSTICE DOUGLAS is of the opinion that judgment should be affirmed, being of the view that appeal is properly before this Court. Reported below: 320 F. Supp. 131.

Certiorari Granted—Reversed and Remanded. (See No. 6131, *ante*, p. 847.)

Certiorari Granted—Vacated and Remanded, or Reversed

No. 786. CHILDS *v.* OREGON ET AL. C. A. 9th Cir. Certiorari granted and judgment reversed. *Redrup* v. *New York*, 386 U. S. 767 (1967). THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be denied. Reported below: 431 F. 2d 272.

No. 56. EPPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded to the District Court for the Northern District of Oklahoma with directions to dismiss indictment. *Durham* v. *United States*, *ante*, p. 481. THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN are of the opinion that motion of counsel for respondent to dismiss petition as moot should be

granted. See dissenting opinions in *Durham* v. *United States, supra,* p. 483. Reported below: 416 F. 2d 887.

No. 72. UNITED STATES *v.* SHIELDS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Gillette* v. *United States,* and *Negre* v. *Larsen, ante,* p. 437. MR. JUSTICE DOUGLAS dissents. Reported below: 416 F. 2d 935.

No. 976. SOMERVILLE *v.* ILLINOIS. C. A. 7th Cir. Certiorari granted. Judgment vacated and case remanded for reconsideration in light of *United States* v. *Jorn,* 400 U. S. 470, and *Downum* v. *United States,* 372 U. S. 734 (1963). MR. JUSTICE DOUGLAS is of the opinion that the petition should be granted and judgment reversed. *United States* v. *Jorn, supra.* Reported below: 429 F. 2d 1335.

Miscellaneous Orders

No. 712. TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL. C. A. 4th Cir. [Certiorari granted, 400 U. S. 963.] Motion for leave to file petitioners' reply brief out of time granted.

No. 824. M. F. A. CENTRAL COOPERATIVE ET AL. *v.* BOOKWALTER, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 8th Cir. Motion to expedite consideration of petition for writ of certiorari denied. Motion of petitioners to argue orally as *amicus curiae* in No. 1082 denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions. Reported below: 427 F. 2d 1341.

No. 6400. WEBSTER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. Reported below: 426 F. 2d 289.

No. 1395. DeSapio *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to examine sealed briefs filed on behalf of respondent in No. 825, October Term, 1970, granted. Mr. Justice White took no part in the consideration or decision of this motion. Reported below: 435 F. 2d 272.

No. 5940. Haines *v.* Kerner et al. C. A. 7th Cir. [Certiorari granted, *ante*, p. 954.] Motion of petitioner for appointment of counsel granted. It is ordered that Stanley A. Bass, of New York, New York, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 6307. Frias *v.* Nelson, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 1274. Rafter *v.* Hoyt, Judge. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 1325. North Carolina *v.* Rice. C. A. 4th Cir. Certiorari granted. Reported below: 434 F. 2d 297.

No. 1332. Reliance Electric Co. *v.* Emerson Electric Co. C. A. 8th Cir. Certiorari granted. Reported below: 434 F. 2d 918.

Certiorari Denied. (See also Nos. 1229, 1313, and 1330, *supra.*)

No. 1103. In re Metropolitan Realty Corp. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 676.

No. 1254. District Council 51, American Federation of State, County and Municipal Employees, et al. *v.* Goldberg et al. Sup. Ct. Ohio. Certiorari denied.

No. 1216. SID W. RICHARDSON FOUNDATION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 710.

No. 1287. GRIECO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 677.

No. 1290. ATWELL *v.* RETAIL CREDIT CO. C. A. 4th Cir. Certiorari denied. Reported below: 431 F. 2d 1008.

No. 1291. KELLWOOD CO., OTTENHEIMER DIVISION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 1069.

No. 1293. UNITED STEELWORKERS OF AMERICA, AFL–CIO *v.* ABRAMS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 1234.

No. 1295. BALLOU ET AL. *v.* GENERAL ELECTRIC CO. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 2d 109.

No. 1298. PREISER SCIENTIFIC, INC., OF OHIO, ET AL. *v.* PIEDMONT AVIATION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 432 F. 2d 1002.

No. 1299. SZOT *v.* FLORIDA INDUSTRIAL COMMISSION ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 1301. RUSCITO ET AL. *v.* SCHAFFER, SECRETARY OF STATE OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 584.

No. 1302. BESSESEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 2d 861.

No. 1304. ALEXANDER ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 281.

No. 1306. HELD *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 435 F. 2d 1361.

No. 1311. BURNETT *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 1356.

No. 1312. HUBBARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 2d 62.

No. 1318. ROGERS, GUARDIAN, ET AL. *v.* RAY GARDNER FLYING SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1389.

No. 1319. CITY OF LACKAWANNA, NEW YORK, ET AL. *v.* KENNEDY PARK HOMES ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 108.

No. 1320. SHAPIRO *v.* EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 168, 270 A. 2d 410.

No. 1327. OLDS *v.* PENNSALT CHEMICALS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 432 F. 2d 1033.

No. 1335. BUTTS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6077. ELLIS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 430 F. 2d 1352.

No. 6117. SABOW *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 6200. EMMONS *v.* TAYLOR ET AL. C. A. D. C. Cir. Certiorari denied.

No. 6223. IN RE DISBARMENT OF CHIPLEY. Sup. Ct. S. C. Certiorari denied. Reported below: 254 S. C. 588, 176 S. E. 2d 412.

No. 6210. BRADEN *v.* HOCKLANDER, JUDGE. Sup. Ct. Ala. Certiorari denied.

No. 6282. DOONER *v.* DIRECTOR, KINGS PARK STATE HOSPITAL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 6297. WRIGHT *v.* DISTRICT COURT OF MONTGOMERY COUNTY. Sup. Ct. Kan. Certiorari denied.

No. 6350. CARR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6456. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 681.

No. 6472. AKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1011.

No. 6482. HIGDON *v.* UNITED STATES; and
No. 1303. HIGDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 434 F. 2d 622.

No. 6499. FASSLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 161.

No. 6500. GEIGER *v.* McBEE. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 344.

No. 6505. NIEMEYER *v.* CICCONE, MEDICAL CENTER DIRECTOR, ET AL. C. A. 8th Cir. Certiorari denied.

No. 6508. GOETLUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 971.

No. 6511. SMITH *v.* RODGERS, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied.

No. 6517. BENOIT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 6534. MINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 1365.

No. 6557. SEALEY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 6558. KORESKO *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 6571. KNIGHT *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 6574. HOAG *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 6576. FANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 364.

No. 6589. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 6602. BAKER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 122 Ga. App. 587, 178 S. E. 2d 278.

No. 6614. VASQUEZ *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 260 N. E. 2d 779.

No. 6617. FEHLHABER ET AL. *v.* SAN FRANCISCO UNIFIED SCHOOL DISTRICT ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 937, 479 P. 2d 669.

No. 6649. MALONE *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 12. COX, PENITENTIARY SUPERINTENDENT *v.* MCLAREN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would dismiss petition as moot.

No. 45. PRATT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 412 F. 2d 426.

No. 1000. SCUDDER & GERMAN *v.* PEARLSTEIN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1136.

No. 1243. HOPKINS *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 433 F. 2d 1041.

No. 1297. BOARD OF EDUCATION OF NETCONG ET AL. *v.* STATE BOARD OF EDUCATION ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 57 N. J. 172, 270 A. 2d 412.

No. 1300. CURTIN, ADMINISTRATRIX *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 12 Cal. App. 3d 105, 90 Cal. Rptr. 461.

No. 1321. MAKER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted and judgment reversed. *Thompson* v. *Louisville*, 362 U. S. 199 (1960). Reported below: 48 Wis. 2d 612, 180 N. W. 2d 707.

No. 5311. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE HARLAN is of the opinion that certiorari should be granted, judgment vacated, and case remanded for reconsideration in light of his opinion in *Welsh* v. *United States*, 398 U. S. 333, 344 (1970), and *Gillette* v. *United States*, *ante*, p. 437. Reported below: 423 F. 2d 556.

No. 5722. COMPTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 428 F. 2d 18.

No. 6224. HAFFKE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion to strike exhibits submitted by respondent and certiorari denied.

No. 6272. SMITH *v.* BLOOM, JUDGE. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 6491. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 435 F. 2d 708.

No. 6515. MEADOWS ET AL. *v.* UNITED STATES MARSHAL, NORTHERN DISTRICT OF GEORGIA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 434 F. 2d 1007.

Rehearing Denied

No. 988. MINNESOTA MINING & MANUFACTURING CO. *v.* NORTON CO. ET AL., *ante*, p. 925. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 989. BILLY BAXTER, INC. *v.* COCA-COLA CO. ET AL., *ante*, p. 923. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 1016. JONES *v.* UNITED STATES, *ante*, p. 926. Motion for leave to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 47. USNER *v.* LUCKENBACH OVERSEAS CORP. ET AL., 400 U. S. 494;

No. 80. ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC., *ante*, p. 321;

No. 109. TIME, INC. *v.* PAPE, *ante*, p. 279;

No. 787. OHLENDORF ET UX. *v.* GAYLES ET AL., *ante*, p. 929;

No. 901. SHERMAN ET AL. *v.* UNITED STATES, *ante*, p. 908;

No. 1001. NATIONAL SCREEN SERVICE CORP. *v.* POSTER EXCHANGE, INC., *ante*, p. 912;

No. 1004. HANSEN *v.* HAAGENSEN, *ante*, p. 912;

No. 5964. WALKER *v.* BRANTLEY, WARDEN, *ante*, p. 942;

No. 6068. WIMBERLEY *v.* CRAVEN, WARDEN, ET AL., *ante*, p. 915;

No. 6096. MARANZE *v.* DAYTON SCHOOL BOARD ET AL., *ante*, p. 916;

No. 6155. BRYANT *v.* MARYLAND, *ante*, p. 917; and

No. 6189. MCPEAK ET AL. *v.* ADJUSTMENT CORP., *ante*, p. 919. Petitions for rehearing denied.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

EFFECTIVE JULY 1, 1971

The following amendments to the Rules of Civil Procedure were prescribed by the Supreme Court of the United States on March 1, 1971, pursuant to 28 U. S. C. §§ 2072 and 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1018. The Judicial Conference report referred to in that letter is not reproduced herein. (Where used with respect to the following amendments of the Rules of Civil, Criminal, and Appellate Procedure, 28 U. S. C. § 2072 and 18 U. S. C. § 3771 refer to Supplement V of the 1964 edition of the United States Code.)

These amendments became effective July 1, 1971, as provided in paragraph 1 of the Court's order, *post*, p. 1019.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, and 398 U. S. 977.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 1, 1971

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to submit to the Congress the attached amendments to the Rules of Civil Procedure for the United States District Courts, to the Rules of Criminal Procedure for the United States District Courts, and to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court, pursuant to Title 28, United States Code, Sections 2072 and 2075 and Title 18, United States Code, Sections 3771 and 3772. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from the action of the Court.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 1, 1971

ORDERED:

1. That subdivision (a) of Rule 6, paragraph (4) of subdivision (a) of Rule 27, paragraph (6) of subdivision (b) of Rule 30, subdivision (c) of Rule 77, and paragraph (2) of subdivision (a) of Rule 81 of the Federal Rules of Civil Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See *infra*, pp. 1021–1023.]

2. That subdivision (a) of Rule 45 and all of Rule 56 of the Federal Rules of Criminal Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See *infra*, p. 1027.]

3. That subdivision (a) of Rule 26 and subdivision (a) of Rule 45 of the Federal Rules of Appellate Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See *infra*, pp. 1031–1032.]

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Rules of Civil, Criminal and Appellate Procedure, in accordance with the provisions of Title 18, U. S. C. § 3771, and Title 28, U. S. C., §§ 2072 and 2075.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from the order entered by the Court today amending the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

Rule 6. Time

(*a*) *Computation.*—In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77 (c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

Rule 27. Depositions before action or pending appeal

(*a*) *Before action*

. . . . .

(*4*) *Use of deposition.*—If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32 (a).

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Rule 30. Depositions upon oral examination

(*b*) *Notice of examination: General requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization*

. . . . .

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 77. District courts and clerks

(*c*) *Clerk's office and orders by clerk.*—The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action

may be suspended or altered or rescinded by the court upon cause shown.

Rule 81. Applicability in general

(*a*) *To what proceedings applicable*

. . . . .

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U. S. C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

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AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

EFFECTIVE JULY 1, 1971

The following amendments to the Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on March 1, 1971, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1018. The Judicial Conference report referred to in that letter is not reproduced herein.

These amendments became effective July 1, 1971, as provided in paragraph 2 of the Court's order, *ante*, p. 1019.

For earlier publications of the Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, and 389 U. S. 1125.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

Rule 45. Time

(*a*) *Computation.*—In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

Rule 56. Courts and clerks

The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

EFFECTIVE JULY 1, 1971

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on March 1, 1971, pursuant to 18 U. S. C. §§ 3771 and 3772 and 28 U. S. C. §§ 2072 and 2075, and were reported by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1018. The Judicial Conference report referred to in that letter is not reproduced herein.

These amendments became effective July 1, 1971, as provided by paragraph 3 of the Court's order, *ante*, p. 1019.

For earlier publication of the Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063 and 398 U. S. 971.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

Rule 26. Computation and extension of time

(*a*) *Computation of time.*—In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

Rule 45. Duties of clerks

(*a*) *General provisions.*—The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while he continues in office. The court of appeals shall be deemed always open for the purpose of filing any proper

paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

Reporter's Note

The next page is purposely numbered 1201. The numbers between 1032 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM FEBRUARY 11 THROUGH MARCH 1, 1971

KARR *v.* SCHMIDT, PRINCIPAL OF CORONADO HIGH SCHOOL, ET AL.

ON MOTION TO VACATE A STAY OF INJUNCTION PENDING APPEAL

Decided February 11, 1971

Motion to vacate Court of Appeals' stay of District Court's order enjoining El Paso, Texas, public school authorities from enforcing rules regarding the length of schoolboys' hair is denied, as JUSTICE BLACK refuses to hold, or predict that this Court will hold, that federal courts have the constitutional power to interfere in this way with the public school system operated by the States.

See: 320 F. Supp. 728.

MR. JUSTICE BLACK, Circuit Justice.

This "Emergency Motion to Vacate Stay of Injunction Pending Appeal" has been presented to me as the Supreme Court Justice assigned to the Court of Appeals for the Fifth Circuit. The motion concerns rules adopted by the school authorities of El Paso, Texas, providing that schoolboys' hair must not "hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision." The rules also provide that boys will not be admitted to or allowed to remain in school unless their hair meets this standard. The United States District Court for the Western District of Texas, El Paso Division, held after hearings that this local student hair length rule violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and enjoined its enforcement, declining to suspend its injunction pending appeal. On motion of the school authorities, the Court of Appeals for the Fifth Circuit stayed and suspended the District Court's

injunction and the student appellees have asked me to vacate the Court of Appeals' stay of the injunction. Should I vacate the stay the El Paso school authorities would remain subject to the District Court's injunction and would thereby be forbidden to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their vision.

I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the States of their traditionally recognized power to run their school systems in accordance with their own best judgment as to the appropriate length of hair for students.

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on

the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

Motion denied.

HAYWOOD *v.* NATIONAL BASKETBALL ASSN.

ON APPLICATION FOR STAY

Decided March 1, 1971

Applicant, a former Olympic star who had signed with the Seattle team of the National Basketball Association (NBA), brought an action against the NBA, claiming that its threatened sanctions against him and the Seattle team for alleged noncompliance with the NBA's player draft rules violated the antitrust laws. The District Court's grant of an injunction *pendente lite* permitting applicant to play for the Seattle team was stayed by the Court of Appeals. Applicant seeks a stay of the Court of Appeals' action. *Held:* The equities as between the parties favor reinstatement of the District Court's preliminary injunction, 28 U. S. C. § 1651 (a), which will enable applicant to play and thus further Seattle's efforts to qualify for the imminent playoffs, and should it be necessary that court can fashion appropriate relief in light of the outcome of the litigation and the athletic competition.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for a stay of an order issued by the Court of Appeals for the Ninth Circuit. It raises questions under the Sherman Act concerning the legality of the professional basketball college player draft. The hearing on the merits will be heard by the District Court for the Central District of California.

The Seattle club for which the applicant now plays basketball has joined in the request for the stay, while the NBA opposes.

Under the rules of the NBA a college player cannot be drafted until four years after he has graduated from high school. Players are drafted by teams in the inverse order of their finish during the previous season. No team may negotiate with a player drafted by another team.

Applicant played with the 1968 Olympic team and then went to college. Prior to graduation he signed with

the rival American Basketball Association, but upon turning 21 he repudiated the contract, charging fraud. He then signed with Seattle of the NBA. This signing was less than four years after his high school class had graduated (thus leaving him ineligible to be drafted under the NBA rules). The NBA threatened to disallow the contract and also threatened Seattle's team with various sanctions.

Applicant then commenced an antitrust action against the NBA. He alleges the conduct of the NBA is a group boycott of himself and that under *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457, and *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, it is a *per se* violation of the Sherman Act. He was granted an injunction *pendente lite* which allowed him to play for Seattle and forbade NBA to take sanctions against the Seattle team. The District Court ruled:

> "If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him."

The college player draft binds the player to the team selected. Basketball, however, does not enjoy exemption from the antitrust laws. Thus the decision in this suit would be similar to the one on baseball's reserve clause which our decisions exempting baseball from the antitrust laws have foreclosed. See *Federal Baseball Club* v. *National League*, 259 U. S. 200; *Toolson* v. *New York*

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Yankees, 346 U. S. 356. This group boycott issue in professional sports is a significant one.

The NBA appealed the granting of the preliminary injunction to the Court of Appeals for the Ninth Circuit. That court stayed the injunction, stating:

> "We have considered the status quo existing prior to the District Court's action and the disturbance of that status resulting from the injunction; the nature and extent of injury which continuation of the injunction or its stay would cause to the respective parties; and the public interest in the institution of professional basketball and the orderly regulation of its affairs."

The matter is of some urgency because the athletic contests are under way and the playoffs between the various clubs will begin on March 23. Should applicant prevail at the trial his team will probably not be in the playoffs, because under the stay order issued by the Court of Appeals he is unable to play. Should he be allowed to play and his team not make the playoffs then no one, of course, will have been injured. Should he be allowed to play and his team does make the playoffs but the District Court decision goes in favor of the NBA, then it would be for the District Court to determine whether the NBA could disregard the Seattle victories in all games in which he participated and recompute who should be in the playoffs.

To dissolve the stay would preserve the interest and integrity of the playoff system, as I have indicated. Should there not be a decision prior to beginning of the playoffs and should Seattle make the playoffs then the District Court could fashion whatever relief it deems equitable.

In view of the equities between the parties, 28 U. S. C. § 1651 (a), I have decided to allow the preliminary in-

junction of the District Court to be reinstated. The status quo provided by the Court of Appeals is the status quo before applicant signed with Seattle. The District Court preserved the status quo prior to the NBA's action against Seattle and Haywood. That is the course I deem most worthy of this interim protection. The stay will issue.

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CONSENT TO BE JOINED. See **Jurisdiction,** 8–9; **Water Rights,** 1–2.

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CONSTITUTIONAL LAW. See also **Abstention; Arrests; Attorneys,** 2–3; **Citizenship; Decedents' Estates; Declaratory Judgments; Divorce; Evidence,** 1; **Federal-State Relations; Forfeitures,** 1–2; **Indigents,** 1–3; **Injunctions,** 1–4; **Jurisdiction,** 3, 5; **Libel,** 1–2; **National Firearms Act,** 1–2; **Procedure,** 1, 4, 6–10, 13–15, 18–19; **Public Officials; Punishment; Selective Service Act.**

I. Due Process.

1. *Amended National Firearms Act—Intent.*—The amended Act's prohibition against a person's "receiv[ing] or posssess[ing] a firearm which is not registered to him," requires no specific intent and the absence of such a requirement in this essentially regulatory statute in the area of public safety does not violate due process requirements either as respects the substantive count or the conspiracy count. United States v. Freed, p. 601.

2. *Inability to pay court fees and costs—Divorce proceedings.*—In view of basic position of marriage in our society and state monopolization of means for dissolving that relationship, due process prohibits Connecticut from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Boddie v. Connecticut, p. 371.

II. Equal Protection of the Laws.

1. *Descent and distribution—Illegitimate children.*—Louisiana statutory intestate succession scheme is within the State's power to establish rules for the protection and strengthening of family life and for disposition of property, and in view of various statutory alternatives did not constitute an insurmountable barrier to illegitimate children. Labine v. Vincent, p. 532.

2. *Nonpayment of traffic fines—Imprisonment.*—It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it. Tate v. Short, p. 395.

III. First Amendment.

1. *Admission to New York Bar.*—The "character and general fitness" requirement for admission to New York Bar is not violative of the Constitution. New York's carefully administered screening system does not necessarily result in chilling the exercise of con-

CONSTITUTIONAL LAW—Continued.

stitutional freedoms, and whether different policy might be wiser rests with State's policymaking bodies. Law Students Research Council v. Wadmond, p. 154.

2. *Establishment of Religion Clause—Conscientious objectors.*—Section 6 (j) of the Military Selective Service Act of 1967 does not violate the Establishment Clause as the section on its face does not discriminate on basis of religious affiliation or belief, and there are valid neutral reasons, with emphasis on the maintenance of fairness in the administration of military conscription, for the congressional limitation of the exemption to "war in any form." Gillette v. United States, p. 437.

3. *Free Exercise Clause—Conscientious objectors.*—Section 6 (j) of the Military Selective Service Act of 1967 does not violate the Free Exercise Clause, as it is not designed to interfere with any religious practice and does not penalize any theological position; and any incidental burdens felt by petitioners are justified by substantial governmental interests relating to military conscription. Gillette v. United States, p. 437.

IV. Fourteenth Amendment.

Loss of citizenship—Birth abroad.—Congress has power to impose condition subsequent of residence in this country on appellee, who does not come within Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States," and its imposition is not unreasonable, arbitrary, or unlawful. Rogers v. Bellei, p. 815.

V. Freedom of Association.

Injured railroad workers—Legal services.—Injunction issued against union in this case violated its right under First and Fourteenth Amendments to engage in group activity to enable its members to meet costs of legal representation and otherwise to secure meaningful access to the courts. United Transportation Union v. Michigan Bar, p. 576.

VI. Freedom of the Press.

1. *Candidates for public office—Libel.*—Publications concerning candidates for public office must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. Monitor Patriot Co. v. Roy, p. 265.

2. *Charge of criminal conduct—Political candidates.*—Charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for purpose of

CONSTITUTIONAL LAW—Continued.

applying the "knowing falsehood or reckless disregard" rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Monitor Patriot Co. v. Roy, p. 265; Ocala Star-Banner Co. v. Damron, p. 295.

3. *Magazine article—Interpretation of Civil Rights Commission report.*—Magazine's omission of word "alleged" amounted to adoption of one of several rational interpretations of Civil Rights Commission report bristling with ambiguities, and while the choice might reflect misconception, it was not enough to create jury issue of "malice" under rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, as it would impose stricter standard of liability on errors of interpretation than on errors of historic fact. Time, Inc. v. Pape, p. 279.

VII. Search and Seizure.

1. *Arrest warrant—Sheriff's complaint.*—Petitioner's arrest violated his rights and the evidence seized incident thereto should have been excluded from his trial, as the complaint, which did not mention that the sheriff acted on an informer's tip, was merely conclusory and could not support the independent judgment of a disinterested magistrate. Whiteley v. Warden, p. 560.

2. *Electronic eavesdropping—Informer.*—Court of Appeals' holding that evidence of incriminating statements of respondent that were overheard by warrantless electronic eavesdropping by Government agents by means of transmitter which informer consented to wear during meetings with respondent was inadmissible under Fourth Amendment, is reversed. United States v. White, p. 745.

3. *Incident to arrest—Retroactivity.*—Court of Appeals' holding that intervening decision in *Chimel* v. *California*, 395 U. S. 752, narrowing scope of permissible searches incident to arrest, was not to be retroactively applied to searches antedating the date it was decided, is affirmed. Williams v. United States, p. 646.

4. *Probable cause—Incident to arrest.*—Arrest and search were valid under Fourth Amendment, since police had probable cause to arrest Hill and reasonably believed arrestee was Hill. Accordingly, they were entitled to do what law allowed them to do if arrestee was in fact Hill, that is, to search incident to arrest and to seize evidence of crime they had probable cause to believe Hill committed. Hill v. California, p. 797.

5. *Retroactivity.—Chimel* v. *California*, 395 U. S. 752, is inapplicable to searches antedating that decision, regardless of whether case is on direct or collateral review or involves state or federal prisoners. Hill v. California, p. 797.

CONSTITUTIONAL LAW—Continued.

VIII. Self-Incrimination.

1. *Forfeiture proceeding—Gambling tax.*—The Fifth Amendment privilege may properly be invoked here since the forfeiture statutes, when viewed in their entirety, are intended to penalize only persons significantly involved in a criminal enterprise. United States v. U. S. Coin & Currency, p. 715.

2. *Gambling income—Wagering tax forms—Retroactivity.*—Court of Appeals' holding that *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, would not be applied retroactively to overturn earlier income tax evasion conviction based on then-constitutional principles permitting introduction in evidence of wagering tax forms, is affirmed. Mackey v. United States, p. 667.

3. *National Firearms Act—Amended statute.*—The scheme of the amended Act, which significantly alters the scheme presented in *Haynes* v. *United States*, 390 U. S. 85, does not involve any violation of the Self-Incrimination Clause of the Fifth Amendment. The amended Act fully protects a person against incrimination for past or present violations and creates no substantial hazards of future incrimination. United States v. Freed, p. 601.

CONSTITUTIONAL OATHS. See **Attorneys**, 2–3; **Constitutional Law**, III, 1.

CONSTRUCTION OF THE STATUTE. See **Criminal Appeals Act**, 1–2.

CONTAMINATION. See **Jurisdiction**, 7.

CONVERSATIONS. See **Constitutional Law**, VII, 2; **Procedure**, 7.

CORROBORATION. See **Arrests**; **Constitutional Law**, VII, 1; **Procedure**, 4.

COSTS. See **Constitutional Law**, I, 2; **Divorce**; **Indigents**, 1.

COSTS AND EXPENSES OF BANKRUPTCY. See **Bankruptcy Act.**

COUNSEL. See **Constitutional Law**, V; **Criminal Appeals Act**, 1–2; **Evidence**, 1; **Indigents**, 3; **Procedure**, 18.

COUNTERCLAIMS. See **Damages**; **Procedure**, 12; **Releases**; **Statute of Limitations.**

COUNTY TAX ASSESSORS. See **Constitutional Law**, VI, 2; **Libel**, 1; **Public Officials.**

COURT FEES AND COSTS. See **Constitutional Law**, I, 2; **Divorce**; **Indigents**, 1.

COURT OF APPEALS. See **Procedure**, 20.

COURTS. See **Constitutional Law**, I, 2; **Declaratory Judgments; Divorce; Federal-State Relations; Indigents**, 1; **Injunctions**, 1–2; **Jurisdiction**, 3; **Procedure**, 6, 9.

COURTS-MARTIAL. See also **Jurisdiction**, 2.

Crime on military base—Service connected.—An offense committed by a serviceman on a military post that violates the security of a person or of property there is service connected and may be tried by a court-martial. Relford v. U. S. Disciplinary Commandant, p. 355.

CREATING DISSENSION. See **Labor-Management Reporting and Disclosure Act**, 1–2.

CREDIBILITY. See **Evidence**, 1; **Procedure**, 13.

CREDITORS. See **Bankruptcy Act.**

CRIMINAL ANARCHY. See **Declaratory Judgments; Injunctions**, 2; **Procedure**, 6.

CRIMINAL APPEALS ACT.

1. *Jurisdiction—"Construction of the statute" provision—Selective Service regulation.*—This Court has no jurisdiction of the appeal under the "construction of the statute" provision since the interrelation of the regulation and the Military Selective Service Act of 1967 fell short of that required for the dismissal to have been based on the construction of the statute. United States v. Weller, p. 254.

2. *Jurisdiction—"Motion in bar" provision—Selective Service regulation.*—"Motion in bar" provision applies only when defendant, while not denying commission of the offense, claims that an extraneous factor forecloses prosecution. That provision is inapplicable here since appellee contends that his refusal to submit to induction was not a crime because of the denial of counsel by his draft board. United States v. Weller, p. 254.

CRIMINAL CONDUCT. See **Constitutional Law**, VI, 1–2; **Libel**, 1; **Public Officials.**

CRIMINAL ENTERPRISES. See **Constitutional Law**, VIII, 1; **Forfeitures**, 1–2; **Procedure**, 16.

CRIMINAL LAW. See **Arrests; Constitutional Law**, I, 1; II, 2; III, 2–3; VII, 1–5; VIII, 2–3; **Courts-Martial; Criminal Appeals Act**, 1–2; **Declaratory Judgments; Evidence**, 1; **Federal-State Relations; Gambling; Indigents**, 2–3; **Injunctions**, 1–4; **Jurisdiction**, 1–2, 5; **National Firearms Act**, 1–2; **Procedure**, 4–7, 9–11, 13–15, 17–18, 20; **Punishment; Selective Service Act; Travel Act.**

CRIMINAL PROSECUTION. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

CRIMINAL SYNDICALISM ACT. See **Federal-State Relations; Injunctions,** 1; **Jurisdiction,** 3; **Procedure,** 9.

CRYSTAL CITY, FLORIDA. See **Constitutional Law,** VI, 2; **Libel,** 1; **Public Officials.**

CURRENCY. See **Constitutional Law,** VIII, 1; **Forfeitures,** 1–2; **Procedure,** 16.

CUSTODIANS. See **Habeas Corpus; Jurisdiction,** 4.

DAMAGES. See also **Constitutional Law,** VI, 1–3; **Labor-Management Reporting and Disclosure Act,** 1–2; **Libel,** 1–2; **Procedure,** 12; **Public Officials; Releases; Statute of Limitations.**

Antitrust suit—Statute of limitations.—Plaintiff in antitrust suit may recover damages occurring within the statutory limitation period that are the result of conduct occurring prior thereto if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof. Zenith Radio Corp. v. Hazeltine Research, p. 321.

DAMAGE SUITS. See **Constitutional Law,** V.

DEATH. See **Procedure,** 5.

DEBTOR AND CREDITORS. See **Bankruptcy Act.**

DEBTOR IN POSSESSION. See **Bankruptcy Act.**

DECEDENTS' ESTATES. See also **Constitutional Law,** II, 1.

Intestate succession in Louisiana—Illegitimate children—Equal protection of the laws.—Louisiana statutory intestate succession scheme is within the State's power to establish rules for the protection and strengthening of family life and for disposition of property, and in view of various statutory alternatives did not constitute an insurmountable barrier to illegitimate children. Labine v. Vincent, p. 532.

DECLARATORY JUDGMENTS. See also **Injunctions,** 2, 4; **Procedure,** 6, 10.

Federal-state relations—State criminal prosecution.—Same principles that govern propriety of federal injunctions of state criminal proceedings govern issuance of federal declaratory judgments in connection with such proceedings, and appellants here should have been denied declaratory relief without consideration of the merits of their constitutional claims. Samuels v. Mackell, p. 66.

DECLINATION OF JURISDICTION. See **Jurisdiction,** 7.

DEFAMATORY PUBLICATIONS. See **Constitutional Law,** VI, 1–3; **Libel,** 1–2; **Public Officials.**

DEFENSES. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

DELEGATION OF AUTHORITY. See **National Labor Relations Act.**

DENIAL OF COUNSEL. See **Criminal Appeals Act,** 1–2.

DEPARTMENT OF TRANSPORTATION ACT. See **Administrative Procedure,** 1–3.

DESCENT AND DISTRIBUTION. See **Constitutional Law,** II, 1; **Decedents' Estates.**

DESTRUCTION OF BUSINESS. See **Procedure,** 2.

DIRECT APPEALS. See **Constitutional Law,** VII, 3; **Procedure,** 15.

DIRECT REVIEW. See **Procedure,** 5.

DISCIPLINARY PROCEEDINGS. See **Labor-Management Reporting and Disclosure Act,** 1–2.

DISCRETION. See **Administrative Procedure,** 1–3; **Damages; Jurisdiction,** 7; **Procedure,** 12; **Releases; Statute of Limitations.**

DISCRIMINATION. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** II, 1; **Decedents' Estates.**

DISSENSION IN UNION. See **Labor-Management Reporting and Disclosure Act,** 1–2.

DISTRIBUTORS. See **Constitutional Law,** VI, 1; **Libel,** 1.

DISTRICT COURTS. See **Habeas Corpus; Jurisdiction,** 1, 4; **Labor-Management Reporting and Disclosure Act,** 1–2; **Procedure,** 11.

DIVORCE. See also **Constitutional Law,** I, 2; **Indigents,** 1.

Inability to pay court fees and costs—Due process.—In view of basic position of marriage in our society and state monopolization of means for dissolving that relationship, due process prohibits Connecticut from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Boddie v. Connecticut, p. 371.

DOUBLE-RENT BONDS. See **Procedure,** 3.

DRAFT BOARDS. See **Criminal Appeals Act,** 1–2.

DRUGS. See **Constitutional Law,** VII, 2–5; **Evidence,** 1; **Jurisdiction,** 5; **Procedure,** 7, 13–15.

DUAL CITIZENSHIP. See **Citizenship; Constitutional Law,** IV.

DUE PROCESS. See **Constitutional Law,** I; VIII, 3; **Decedents' Estates; Declaratory Judgments; Divorce; Indigents,** 1; **Injunctions,** 2; **National Firearms Act,** 1–2; **Procedure,** 6.

EAGLE RIVER. See **Jurisdiction,** 9; **Water Rights,** 2.

EAVESDROPPING. See **Constitutional Law,** VII, 2; **Procedure,** 7.

EDUCATIONAL TAXES. See **Abstention; Procedure,** 1, 19.

ELECTRONIC EAVESDROPPING. See **Constitutional Law,** VII, 2; **Procedure,** 7.

EL PASO. See **Public Schools.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964,** 1–2; **National Labor Relations Act.**

EMPLOYERS. See **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions.**

EMPLOYMENT QUALIFICATIONS. See **Civil Rights Act of 1964,** 1–2.

ENJOINING STATE PROSECUTIONS. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

ENLISTMENT CONTRACTS. See **Habeas Corpus; Jurisdiction,** 4.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964,** 1–2.

EQUAL PROTECTION OF THE LAWS. See **Abstention; Constitutional Law,** II; **Decedents' Estates; Declaratory Judgments; Indigents,** 1–2; **Injunctions,** 2; **Procedure,** 6; **Punishment.**

EQUITABLE RELIEF. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

ESTABLISHMENT OF RELIGION CLAUSE. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

EVASION OF TAXES. See **Constitutional Law,** VIII, 2; **Procedure,** 17.

EVICTIONS. See **Procedure,** 3.

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EVIDENCE. See also **Administrative Procedure**, 1–3; **Antitrust Acts**; **Arrests**; **Constitutional Law**, VII, 1; **Damages**; **Jurisdiction**, 6; **Labor Unions**; **Procedure**, 4, 12–13; **Releases**; **Statute of Limitations.**

1. *No Miranda warnings—Impeachment—Admissibility of statement.*—Statement inadmissible against defendant in prosecution's case in chief because of lack of procedural safeguards required by *Miranda* v. *Arizona*, 384 U. S. 436, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack credibility of defendant's trial testimony. Harris v. New York, p. 222.

2. *Preponderance-of-evidence standard—Antitrust action against labor union—Clear proof.*—Ordinary preponderance-of-evidence standard is applicable in civil antitrust actions against labor unions except with respect to proving authority of individual members, officers, or agents of union to perform on behalf of union the acts complained of, where the "clear proof" standard applies. Ramsey v. Mine Workers, p. 302.

EXAMINATIONS. See **Attorneys**, 2–3; **Constitutional Law**, III, 1.

EXEMPTIONS. See **Administrative Procedure**, 1–3; **Antitrust Acts**; **Banks**; **Constitutional Law**, III, 2–3; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions**; **Selective Service Act**; **Standing to Sue.**

EXERCISE OF JURISDICTION. See **Jurisdiction**, 7.

EXORBITANT BAIL. See **Injunctions**, 4; **Procedure**, 10.

EXPRESS AGREEMENTS. See **Antitrust Acts**; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

EXPULSION FROM UNION. See **Labor-Management Reporting and Disclosure Act**, 1–2.

FAIRNESS. See **Constitutional Law**, III, 2–3; **Selective Service Act.**

FALSE STORIES. See **Constitutional Law**, VI, 2; **Libel**, 1; **Public Officials.**

FALSIFICATION. See **Constitutional Law**, VI, 3; **Libel**, 2.

FATHERS. See **Constitutional Law**, II, 1; **Decedents' Estates.**

"FEASIBLE AND PRUDENT" ALTERNATIVE. See **Administrative Procedure**, 1–3.

FEDERAL-AID HIGHWAY ACT OF 1968. See **Administrative Procedure**, 1–3.

FEDERAL CRIMES. See **Gambling; Travel Act.**

FEDERAL EMPLOYERS' LIABILITY ACT. See **Constitutional Law,** V.

FEDERAL HIGHWAY ADMINISTRATOR. See **Administrative Procedure,** 1–3.

FEDERAL PRISONERS. See **Constitutional Law,** VII, 3; **Procedure,** 15.

FEDERAL-STATE RELATIONS. See also **Abstention; Declaratory Judgments; Gambling; Injunctions,** 1–4; **Jurisdiction,** 3, 7–9; **Procedure,** 1, 6, 8–10, 19; **Public Schools; Travel Act; Water Rights,** 1–2.

Enjoining state criminal prosecution—Irreparable injury.—Federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances where danger of irreparable loss is both great and immediate in that there is a threat to plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution. Younger v. Harris, p. 37; Samuels v. Mackell, p. 66; Dyson v. Stein, p. 200.

FEES. See **Constitutional Law,** V.

FEES AND COSTS. See **Constitutional Law,** I, 2; **Divorce; Indigents,** 1.

FIFTH AMENDMENT. See **Attorneys,** 1–4; **Constitutional Law,** I, 1; III, 1; VII, 4–5; VIII, 3; **Forfeitures,** 1–2; **Jurisdiction,** 5; **National Firearms Act,** 1–2; **Procedure,** 14.

FILMS. See **Injunctions,** 3; **Procedure,** 8.

FINANCING EDUCATION. See **Abstention; Procedure,** 1, 19.

FINDINGS. See **Administrative Procedure,** 1–3.

FINDINGS AND CONCLUSIONS. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

FINES. See **Constitutional Law,** II, 2; **Indigents,** 2; **Punishment.**

FINGERPRINTS. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

FIREARMS. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

FIRST AMENDMENT. See **Attorneys,** 1–4; **Constitutional Law,** III; V–VI; **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Libel,** 1–2; **Procedure,** 6, 8–10; **Public Officials; Selective Service Act.**

FITNESS FOR OFFICE. See **Constitutional Law**, VI, 1–2; **Libel**, 1; **Public Officials.**

FLORIDA. See **Abstention**; **Constitutional Law**, VI, 2; **Gambling**; **Libel**, 1; **Procedure**, 1, 19; **Public Officials**; **Travel Act.**

FOREIGN-BORN CITIZENS. See **Citizenship**; **Constitutional Law**, IV.

FORFEITURES. See also **Constitutional Law**, VIII, 1; **Procedure**, 16.

1. *Retroactivity—Gambling tax—Self-incrimination.*—Decisions in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, which held that gamblers had the Fifth Amendment right to remain silent despite the statutory requirement that they submit reports which could incriminate them, have retroactive effect in a forfeiture proceeding under 26 U. S. C. § 7302. United States v. U. S. Coin and Currency, p. 715.

2. *Self-incrimination—Gambling taxes.*—The Fifth Amendment privilege may properly be invoked here since the forfeiture statutes, when viewed in their entirety, are intended to penalize only persons significantly involved in a criminal enterprise. United States v. U. S. Coin & Currency, p. 715.

FORMAL FINDINGS. See **Administrative Procedure**, 1–3.

FOURTEENTH AMENDMENT. See **Abstention**; **Arrests**; **Attorneys**, 1–4; **Citizenship**; **Constitutional Law**, I–II; III, 1; IV–V; VI, 1–2; VII, 1, 4–5; **Decedents' Estates**; **Declaratory Judgments**; **Divorce**; **Evidence**, 1; **Federal-State Relations**; **Indigents**, 1–3; **Injunctions**, 1–4; **Jurisdiction**, 1, 3, 5; **Libel**, 1; **Procedure**, 1, 4, 6, 8–11, 13–14, 18–19; **Punishment.**

FOURTH AMENDMENT. See **Arrests**; **Constitutional Law**, VII; **Jurisdiction**, 5; **Procedure**, 4, 7, 14–15.

FREEDOM OF ASSEMBLY. See **Declaratory Judgments**; **Injunctions**, 2; **Procedure**, 6.

FREEDOM OF ASSOCIATION. See **Attorneys**, 1–4; **Constitutional Law**, III, 1; V.

FREEDOM OF EXPRESSION. See **Declaratory Judgments**; **Federal-State Relations**; **Injunctions**, 1–3; **Jurisdiction**, 3; **Procedure**, 6, 8–9.

FREEDOM OF SPEECH. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

FREEDOM OF THE PRESS. See **Constitutional Law**, VI; **Jurisdiction**, 1; **Libel**, 1–2; **Procedure**, 11; **Public Officials.**

FREE EXERCISE CLAUSE. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

FULL AND FAIR HEARINGS. See **Labor-Management Reporting and Disclosure Act,** 1–2.

FUNDS. See **Banks; Standing to Sue.**

FUTURE INCRIMINATION. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

GAMBLING. See also **Travel Act.**

Travel Act—Out-of-state bettors.—Conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of 18 U. S. C. § 1952, the Travel Act. Rewis v. United States, p. 808.

GAMBLING INCOME. See **Constitutional Law,** VIII, 2; **Procedure,** 17.

GAMBLING TAXES. See **Constitutional Law,** VIII, 1; **Forfeitures,** 1–2; **Procedure,** 16.

GENERAL VERDICTS. See **Labor-Management Reporting and Disclosure Act,** 1–2.

GEORGIA. See **Gambling; Habeas Corpus; Indigents,** 3; **Jurisdiction,** 4; **Procedure,** 18; **Travel Act.**

GLASS-STEAGALL BANKING ACT OF 1933. See **Banks; Standing to Sue.**

GOOD FAITH. See **Attorneys,** 1–4; **Constitutional Law,** I, 2; III, 1; VII, 4–5; **Divorce; Indigents,** 1; **Jurisdiction,** 5; **Procedure,** 14.

GOOD-FAITH PROSECUTIONS. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–2; **Jurisdiction,** 3; **Procedure,** 9.

GOVERNMENT AGENTS. See **Constitutional Law,** VII, 2; **Procedure,** 7.

GOVERNMENT'S WATER RIGHTS. See **Jurisdiction,** 8–9; **Water Rights,** 1–2.

GRENADES. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

GROUP ACTIVITIES. See **Constitutional Law,** V.

GUIDELINES. See **Civil Rights Act of 1964,** 1–2.

GUNS. See **Constitutional Law,** VII, 4–5; **Jurisdiction,** 5; **Procedure,** 14.

HABEAS CORPUS. See also **Arrests; Constitutional Law,** VII, 1; **Indigents,** 3; **Jurisdiction,** 4; **Procedure,** 4, 18.

Jurisdiction—Custodian of serviceman—Residence.—District Court did not have jurisdiction to entertain habeas corpus application by Air Force enlisted man in Arizona on temporary duty orders, as no custodian, neither the commanding officer at Moody Air Force Base in Georgia nor anyone in chain of command, was a resident of Arizona. Schlanger v. Seamans, p. 487.

HABITUAL CRIMINALS. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

HAIR LENGTH. See **Public Schools.**

HAND GRENADES. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

HARASSMENT. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–2, 4; **Jurisdiction,** 3; **Procedure,** 6, 9–10.

HEARINGS. See **Abstention; Labor-Management Reporting and Disclosure Act,** 1–2; **Procedure,** 19.

HEROIN. See **Constitutional Law,** VII, 3; **Evidence,** 1; **Procedure,** 13, 15.

HIGH SCHOOL DIPLOMAS. See **Civil Rights Act of 1964,** 1–2.

HIGHWAYS. See **Administrative Procedure,** 1–3.

IDENTITY. See **Constitutional Law,** VII, 4–5; **Jurisdiction,** 5; **Procedure,** 14.

ILLEGITIMATE CHILDREN. See **Constitutional Law,** II, 1; **Decedents' Estates.**

ILLINOIS. See **Injunctions,** 4; **Procedure,** 10.

IMMIGRATION AND NATIONALITY ACT OF 1952. See **Citizenship; Constitutional Law,** IV.

IMPEACHMENT. See **Evidence,** 1; **Procedure,** 13.

IMPLIED AGREEMENTS. See **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions.**

IMPRISONMENT. See **Constitutional Law,** II, 2; **Indigents,** 2; **Punishment.**

INADMISSIBLE EVIDENCE. See **Evidence,** 1; **Procedure,** 13.

INCIDENT TO ARREST. See **Arrests; Constitutional Law,** VII, 1, 3–5; **Jurisdiction,** 5; **Procedure,** 4, 14–15.

INCOME TAXES. See **Bankruptcy Act; Constitutional Law,** VIII, 2; **Procedure,** 17.

INCRIMINATION. See **Constitutional Law,** I, 1; VIII, 3; **National Firearms Act,** 1–2.

INDIGENTS. See also **Constitutional Law,** I, 2; **Divorce; Procedure,** 18; **Punishment.**

1. *Divorce proceedings—Inability to pay court fees and costs—Due process.*—In view of basic position of marriage in our society and state monopolization of means for dissolving that relationship, due process prohibits Connecticut from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Boddie v. Connecticut, p. 371.

2. *Nonpayment of traffic fines—Imprisonment—Equal protection of the laws.*—It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it. Tate v. Short, p. 395.

3. *Right to counsel—Retroactivity.*—On this record petitioner proved he was without counsel due to indigency at time of his conviction, and accordingly he is entitled to relief as *Gideon* v. *Wainwright,* 372 U. S. 335, is fully retroactive. Kitchens v. Smith, p. 847.

INDUCTION. See **Constitutional Law,** III, 2–3; **Criminal Appeals Act,** 1–2; **Selective Service Act.**

INDUSTRIAL WASTE. See **Jurisdiction,** 7.

INFORMERS. See **Constitutional Law,** VII, 2; **Procedure,** 7.

INFORMER'S TIP. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

INFRINGEMENT SUITS. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

INHERITANCE. See **Constitutional Law,** II, 1; **Decedents' Estates.**

INJUNCTIONS. See also **Constitutional Law,** V; **Declaratory Judgments; Federal-State Relations; Jurisdiction,** 3; **Procedure,** 6, 8–10; **Public Schools; Stay.**

1. *Enjoining state criminal prosecutions—Federal-state relations—Irreparable injury.*—Federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances where danger of irreparable loss is both great and immediate in that there is a threat to plaintiff's federally protected rights that

INJUNCTIONS—Continued.

cannot be eliminated by his defense against a single prosecution. Younger v. Harris, p. 37; Samuels v. Mackell, p. 66; Dyson v. Stein, p. 200.

2. *Enjoining state criminal prosecutions—Irreparable injury.*—Since there was no showing that appellants have suffered or will suffer great and immediate irreparable injury by virtue of their being prosecuted in state courts, where they can make their constitutional contentions, there is no basis for federal injunctive relief. Samuels v. Mackell, p. 66; Dyson v. Stein, p. 200.

3. *Federal-state relations—Enjoining state criminal prosecution—Obscene film.*—District Court made no finding that threat to appellees' federally protected rights "[could] not be eliminated by [their] defense against a single criminal prosecution," to meet the great and immediate irreparable injury requirement before a federal injunction of state criminal proceedings can properly issue. Judgment therefore vacated and case remanded. Byrne v. Karalexis, p. 216.

4. *Irreparable injury—Federal-state relations—Declaratory judgments.*—Since no appellee suffered, or was threatened with great and immediate irreparable injury and the future application of the statute was merely speculative, the District Court was not warranted in interfering with state law enforcement by issuance of an injunction or declaratory judgment. Boyle v. Landry, p. 77.

INJURED WORKERS. See **Constitutional Law**, V.

INJURY. See **Damages**; **Procedure**, 12; **Releases**; **Statute of Limitations.**

INSTRUCTIONS TO JURY. See **Constitutional Law**, VI, 1–2; **Libel**, 1; **Public Officials.**

INSTRUCTORS. See **Federal-State Relations**; **Injunctions**, 1; **Jurisdiction**, 3; **Procedure**, 9.

INTELLIGENCE TESTS. See **Civil Rights Act of 1964**, 1–2.

INTENT. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

INTERNAL REVENUE LAWS. See **Constitutional Law**, VIII, 1; **Forfeitures**, 1–2; **Procedure**, 16.

INTERNAL REVENUE SERVICE. See **Constitutional Law**, VIII, 2; **Procedure**, 17.

INTERPRETIVE ARTICLE. See **Constitutional Law**, VI, 3; **Libel**, 2.

INTERSTATE HIGHWAYS. See **Administrative Procedure**, 1–3.

INTERSTATE TRAVEL. See **Gambling; Travel Act.**

INTERVENING LEGISLATION. See **Procedure,** 3.

INTESTATE SUCCESSION. See **Constitutional Law,** II, 1; **Decedents' Estates.**

INTIMIDATION. See **Injunctions,** 4; **Procedure,** 10.

INVESTMENT COMPANIES. See **Banks; Standing to Sue.**

INVESTMENT COMPANY ACT OF 1940. See **Banks; Standing to Sue.**

IRREPARABLE INJURY. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

ISSUING MAGISTRATES. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

ITALY. See **Citizenship; Constitutional Law,** IV.

JAIL SENTENCES. See **Constitutional Law,** II, 2; **Indigents,** 2; **Punishment.**

JOB PERFORMANCE. See **Civil Rights Act of 1964,** 1–2.

JOB REFERRALS. See **Labor-Management Reporting and Disclosure Act,** 1–2.

JOINDER OF UNITED STATES. See **Jurisdiction,** 8–9; **Water Rights,** 1–2.

JUDGES. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

JUDGMENTS. See **Jurisdiction,** 1; **Procedure,** 11.

JUDICIAL REVIEW. See **Administrative Procedure,** 1–3; **Labor-Management Reporting and Disclosure Act,** 1–2.

JURIES. See **Constitutional Law,** VI, 1–3; **Libel,** 1–2; **Public Officials.**

JURISDICTION. See also **Antitrust Acts; Constitutional Law,** VII, 4–5; **Courts-Martial; Criminal Appeals Act,** 1–2; **Evidence,** 2; **Federal-State Relations; Habeas Corpus; Injunctions,** 1; **Labor-Management Reporting and Disclosure Act,** 1–2; **Labor Unions; Procedure,** 9, 11, 14; **Water Rights,** 1–2.

1. *Appeals—Ordinances—Procedure.*—This Court has no jurisdiction to review on direct appeal the validity of the order declaring local ordinance invalid, since it was a decision of a single federal judge and as such was appealable only to the Court of Appeals. Perez v. Ledesma, p. 82.

2. *Crime on military base—Service connected—Court-martial.*—An offense committed by a serviceman on a military post that vio-

JURISDICTION—Continued.

lates the security of a person or of property there is service connected and may be tried by a court-martial. Relford v. U. S. Disciplinary Commandant, p. 355.

3. *Criminal prosecution — Injunctions — Speculative fears.*— No basis for equitable jurisdiction on allegations of appellees who have not been indicted, arrested, or threatened with prosecution, and the normal course of a state criminal prosecution cannot be blocked on basis of fears of prosecution that are merely speculative. Younger v. Harris, p. 37.

4. *Habeas corpus—Residence—Custodian of serviceman.*—District Court did not have jurisdiction to entertain habeas corpus application by Air Force enlisted man in Arizona on temporary duty orders, as no custodian, neither the commanding officer at Moody Air Force Base in Georgia nor anyone in chain of command, was a resident of Arizona. Schlanger v. Seamans, p. 487.

5. *Supreme Court—Admissibility of evidence—Not raised below.*—Since Hill's argument that admission into evidence of pages of his diary violated his Fifth Amendment rights was not raised below, it is not properly before this Court. Hill v. California, p. 797.

6. *Supreme Court—Argument not made below.*—This Court cannot properly consider petitioners' argument about the construction of the Protective Wage Clause since it is not clear if the contention was made below, and whether, in any event, the record supports it. Ramsey v. Mine Workers, p. 302.

7. *Supreme Court—Declination of original jurisdiction—Water pollution.*—Supreme Court declines to exercise its original jurisdiction in suit by Ohio against chemical companies for polluting Lake Erie since issues are bottomed on local law that Ohio courts are competent to consider; several national and international bodies are actively concerned with problems involved here; and nature of case requires resolution of complex, novel and technical factual questions that do not implicate important problems of federal law, which are the primary responsibility of the Court. Ohio v. Wyandotte Chemicals Corp., p. 493.

8. *Water rights—Colorado courts—Reserved rights of United States.*—State court has jurisdiction to adjudicate the reserved water rights of the United States. U. S. v. District Court for Water Div. No. 5, p. 527.

9. *Water rights—Government's reserved rights—Joinder of United States.*—Section 666 (a) of Title 43 U. S. C. is an all-inclusive provision subjecting to general adjudication in state proceedings all rights of the United States to water within a State's jurisdiction

JURISDICTION—Continued.

regardless of how they were acquired. Any conflict between adjudicated rights and reserved rights of the United States, if preserved in the state proceeding, can ultimately be reviewed in this Court. U. S. v. District Court for Eagle County, p. 520.

JURY SELECTION. See **Declaratory Judgments; Injunctions,** 2; **Procedure,** 6.

JUSTIFICATION. See **Constitutional Law,** VI, 1; **Libel,** 1.

KIDNAPING. See **Courts-Martial; Jurisdiction,** 2.

KNOWING FALSEHOOD. See **Constitutional Law,** VI, 1–3; **Libel,** 1–2; **Public Officials.**

LABOR. See **Labor-Management Reporting and Disclosure Act,** 1–2; **National Labor Relations Act.**

LABOR MANAGEMENT RELATIONS ACT. See **Procedure,** 2.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT.

1. *Jurisdiction of District Court—Pre-emption by National Labor Relations Board—Damages for expulsion of union member.*—This action was within competence of District Court, as issues here are whether respondent was denied rights guaranteed him by § 101 (a)(5), and, if so, his consequent entitlement to damages for that denial, questions that are irrelevant to the legality of conduct under the National Labor Relations Act. Boilermakers v. Hardeman, p. 233.

2. *Union disciplinary action—Expulsion of member—"Full and fair hearing."*—Section 101 (a)(5) does not empower the courts to determine what conduct may warrant disciplinary action by a union against its members. Statutory "full and fair hearing" requires that charging party provide some evidence at the hearing to support the charges, and here there was sufficient evidence to support finding that respondent assaulted the union's business manager as charged. Boilermakers v. Hardeman, p. 233.

LABOR UNIONS. See also **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Procedure,** 2.

Wage agreements—Multi-employer bargaining units—Antitrust exemption.—*Mine Workers* v. *Pennington,* 381 U. S. 657, is reaffirmed both with respect to holding (1) that union may make wage agreements with multi-employer bargaining unit and in pursuit of own self-interests seek to secure same terms from other employers, and (2) that antitrust exemption is forfeited if union agrees with employer group to impose certain wage scale on other bargaining units, thus joining conspiracy to limit competition. Ramsey v. Mine Workers, p. 302.

LAKE ERIE. See **Jurisdiction**, 7.

LANDLORD AND TENANTS. See **Procedure**, 3.

LAW STUDENTS. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

LAWYERS. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

LEGAL SERVICES. See **Constitutional Law**, V.

LEGISLATIVE PROGRAM. See **Abstention**; **Procedure**, 1, 19.

LEGITIMATION. See **Constitutional Law**, II, 1; **Decedents' Estates.**

LENGTH OF HAIR. See **Public Schools.**

LIBEL. See also **Constitutional Law**, VI, 1–3; **Public Officials.**

1. *Charge of criminal conduct—Political candidate—Freedom of the press.*—Charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for purpose of applying the "knowing falsehood or reckless disregard" rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Monitor Patriot Co. v. Roy, p. 265; Ocala Star-Banner Co. v. Damron, p. 295.

2. *Magazine article—Interpretation of Civil Rights Commission report—Chicago policeman.*—Magazine's omission of word "alleged" amounted to adoption of one of several rational interpretations of Civil Rights Commission report bristling with ambiguities, and while the choice might reflect misconception, it was not enough to create jury issue of "malice" under rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, as it would impose stricter standard of liability on errors of interpretation than on errors of historic fact. Time, Inc. v. Pape, p. 279.

LIBELOUS PER SE. See **Constitutional Law**, VI, 2; **Libel**, 1; **Public Officials.**

LIMITATION OF ACTIONS. See **Procedure**, 2.

LOCAL TAXES. See **Abstention**; **Procedure**, 1, 19.

LOSS OF CITIZENSHIP. See **Citizenship**; **Constitutional Law**, IV.

LOTTERIES. See **Gambling**; **Travel Act.**

LOUISIANA. See **Constitutional Law**, II, 1; **Decedents' Estates**; **Jurisdiction**, 1; **Procedure**, 11.

LOYALTY. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

MAGAZINES. See **Constitutional Law**, VI, 3; **Jurisdiction**, 1; **Libel**, 2; **Procedure**, 11.

MAGISTRATES. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

MALICE. See **Constitutional Law,** VI, 1–3; **Libel,** 1–2; **Public Officials.**

MARKED BILLS. See **Constitutional Law,** VII, 3; **Procedure,** 15.

MARRIAGE. See **Constitutional Law,** I, 2; **Divorce; Indigents,** 1.

MASSACHUSETTS. See **Injunctions,** 3; **Procedure,** 8.

MAYORS. See **Constitutional Law,** VI, 2; **Libel,** 1; **Public Officials.**

MEMPHIS. See **Administrative Procedure,** 1–3.

MERCURY POLLUTION. See **Jurisdiction,** 7.

MICHIGAN. See **Jurisdiction,** 7.

MICHIGAN BAR. See **Constitutional Law,** V.

MILITARY CONSCRIPTION. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

MILITARY PERSONNEL. See **Courts-Martial; Jurisdiction,** 2.

MILITARY RESERVATION. See **Courts-Martial; Jurisdiction,** 2.

MILITARY SELECTIVE SERVICE ACT OF 1967. See **Constitutional Law,** III, 2–3; **Criminal Appeals Act,** 1–2; **Selective Service Act.**

MILITARY SERVICE. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

MILLAGE ROLLBACK LAW. See **Abstention; Procedure,** 1, 19.

MINES. See **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions.**

MINE WORKERS. See **Procedure,** 2.

MIRANDA WARNINGS. See **Evidence,** 1; **Procedure,** 13.

MISTAKEN IDENTITY. See **Constitutional Law,** VI, 2; VII, 4–5; **Jurisdiction,** 5; **Libel,** 1; **Procedure,** 14; **Public Officials.**

MOB-ACTION STATUTE. See **Injunctions,** 4; **Procedure,** 10.

MONETARY OBLIGATIONS. See **Constitutional Law,** II, 2; **Indigents,** 2; **Punishment.**

MONEY. See **Constitutional Law,** VIII, 1; **Forfeitures,** 1–2; **Procedure,** 16.

MONTHLY ADJUDICATIONS. See **Jurisdiction**, 8; **Water Rights**, 1.

MOODY AIR FORCE BASE. See **Habeas Corpus**; **Jurisdiction**, 4.

MOOTNESS. See **Procedure**, 5, 20.

MOTION PICTURES. See **Injunctions**, 3; **Procedure**, 8.

MOTIONS IN BAR. See **Criminal Appeals Act**, 1–2.

MOTION TO VACATE STAY. See **Public Schools.**

MULTI-EMPLOYER BARGAINING UNITS. See **Antitrust Acts**; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

MUNICIPAL ORDINANCES. See **Injunctions**, 4; **Jurisdiction**, 1; **Procedure**, 10–11.

MUTUAL FUNDS. See **Banks**; **Standing to Sue.**

NARCOTICS. See **Constitutional Law**, VII, 2–5; **Procedure**, 7, 14–15.

NATIONAL BANKS. See **Banks**; **Standing to Sue.**

NATIONAL BASKETBALL ASSOCIATION. See **Stay.**

NATIONAL BITUMINOUS COAL WAGE AGREEMENT. See **Antitrust Acts**; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

NATIONAL FIREARMS ACT. See also **Constitutional Law**, I, 1; VIII, 3.

1. *Amended statute—Intent—Due process.*—The amended Act's prohibition against a person's "receiv[ing] or possess[ing] a firearm which is not registered to him," requires no specific intent and the absence of such a requirement in this essentially regulatory statute in the area of public safety does not violate due process requirements either as respects the substantive count or the conspiracy count. United States v. Freed, p. 601.

2. *Amended statute—Self-incrimination.*—The scheme of the amended Act, which significantly alters the scheme presented in *Haynes* v. *United States*, 390 U. S. 85, does not involve any violation of the Self-Incrimination Clause of the Fifth Amendment. The amended Act fully protects a person against incrimination for past or present violations and creates no substantial hazards of future incrimination. United States v. Freed, p. 601.

NATIONALITY. See **Citizenship**; **Constitutional Law**, IV.

NATIONAL LABOR RELATIONS ACT.

Delegation of authority—Regional directors—Representation proceedings.—Under § 3 (b) of the Act the NLRB is permitted to delegate to the regional director its authority to determine the appropriate bargaining unit, and plenary review by the NLRB of such determination is not mandatory. Magnesium Casting Co. v. NLRB, p. 137.

NATIONAL LABOR RELATIONS BOARD. See **Labor-Management Reporting and Disclosure Act**, 1–2.

NATURAL CHILDREN. See **Constitutional Law**, II, 1; **Decedents' Estates.**

NEGROES. See **Civil Rights Act of 1964**, 1–2; **Injunctions**, 4; **Procedure**, 10.

NET-WORTH METHOD. See **Constitutional Law**, VIII, 2; **Procedure**, 17.

NEW HAMPSHIRE. See **Constitutional Law**, VI, 1–2; **Libel**, 1.

NEWSPAPERS. See **Constitutional Law**, VI, 1–2; **Injunctions**, 1–2; **Libel**, 1; **Procedure**, 9; **Public Officials.**

NEW YORK. See **Attorneys**, 2–4; **Constitutional Law**, III, 1; **Declaratory Judgments**; **Evidence**, 1; **Injunctions**, 2; **Procedure**, 6, 13.

NON-MILITARY OFFENSES. See **Courts-Martial**; **Jurisdiction**, 2.

NONPAYMENT OF FINES. See **Constitutional Law**, II, 2; **Indigents**, 2; **Punishment.**

NORRIS-LaGUARDIA ACT. See **Antitrust Acts**; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

NUISANCES. See **Jurisdiction**, 7.

OATHS. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

OBSCENITY. See **Injunctions**, 3; **Jurisdiction**, 1; **Procedure**, 8, 11.

OCALA, FLORIDA. See **Constitutional Law**, VI, 2; **Libel**, 1; **Public Officials.**

OFFENSES. See **Courts-Martial**; **Jurisdiction**, 2.

OFFICIAL CONDUCT. See **Constitutional Law**, VI, 1–3; **Libel**, 1–2; **Public Officials.**

OHIO. See **Attorneys**, 4; **Jurisdiction**, 7.

OPEN-END INVESTMENT COMPANIES. See **Banks; Standing to Sue.**

ORDERS. See **Jurisdiction,** 1; **Procedure,** 11.

ORDINANCES. See **Injunctions,** 4; **Jurisdiction,** 1; **Procedure,** 10–11.

ORGANIZATIONAL MEMBERSHIPS. See **Attorneys,** 1–4; **Constitutional Law,** III, 1.

ORIGINAL JURISDICTION. See **Jurisdiction,** 7.

OUT-OF-STATE BETTORS. See **Gambling; Travel Act.**

OVERBREADTH. See **Attorneys,** 1–4; **Constitutional Law,** III, 1; **Federal-State Relations; Injunctions,** 1, 4; **Jurisdiction,** 3; **Procedure,** 9–10.

OVERTON PARK. See **Administrative Procedure,** 1–3.

PARENTAGE. See **Citizenship; Constitutional Law,** IV.

PARENTS. See **Constitutional Law,** II, 1; **Decedents' Estates.**

PARISH ORDINANCES. See **Jurisdiction,** 1; **Procedure,** 11.

PARKS. See **Administrative Procedure,** 1–3.

PARTICIPATION IN WAR. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

PARTICULAR WARS. See **Constitutional Law,** III, 2–3; **Selective Service Act.**

PARTIES. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

PASSPORTS. See **Citizenship; Constitutional Law,** IV.

PATENT INFRINGEMENT. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

PATENT POOLS. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

PAUPERS. See **Constitutional Law,** I, 2; II, 2; **Divorce; Indigents,** 1–3; **Procedure,** 18; **Punishment.**

PERJURY. See **Attorneys,** 1, 4; **Constitutional Law,** VI, 2; **Libel,** 1; **Public Officials.**

PERSONAL APPEARANCES. See **Criminal Appeals Act,** 1–2.

PERSONNEL TESTING. See **Civil Rights Act of 1964,** 1–2.

PETITIONS FOR CERTIORARI. See **Procedure,** 5, 20.

PETITIONS FOR REHEARING. See **Procedure,** 5, 20.

PHOTOGRAPHS. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

PLAYER DRAFT RULES. See **Stay.**

PLAYOFF GAMES. See **Stay.**

PLENARY REVIEW. See **National Labor Relations Act.**

POLICE. See **Constitutional Law**, VII, 4–5; **Jurisdiction**, 5; **Procedure**, 14.

POLICE OFFICERS. See **Constitutional Law**, VI, 3; **Libel**, 2.

POLICE RADIO BULLETINS. See **Arrests**; **Constitutional Law**, VII, 1; **Procedure**, 4.

POLITICAL BELIEFS. See **Attorneys**, 1, 4; **Federal-State Relations**; **Injunctions**, 1; **Jurisdiction**, 3; **Procedure**, 9.

POLITICAL CANDIDATES. See **Constitutional Law**, VI, 1–2; **Libel**, 1.

POLLUTION. See **Jurisdiction**, 7.

POOR PERSONS. See **Constitutional Law**, I, 2; II, 2; **Divorce**; **Indigents**, 1–3; **Procedure**, 3, 18; **Punishment.**

PORNOGRAPHY. See **Injunctions**, 3; **Jurisdiction**, 1; **Procedure**, 9, 11.

POSSESSION OF FIREARMS. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

POSTING OF BONDS. See **Procedure**, 3.

POVERTY. See **Constitutional Law**, I, 2; II, 2; **Divorce**; **Indigents**, 1–3; **Procedure**, 3, 18; **Punishment.**

POWER GENERATING STATION. See **Civil Rights Act of 1964**, 1–2.

PRACTICE OF LAW. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

PRE-EMPTION. See **Declaratory Judgments**; **Injunctions**, 2, 4; **Labor-Management Reporting and Disclosure Act**, 1–2; **Procedure**, 6, 10.

PREPONDERANCE OF EVIDENCE. See **Antitrust Acts**; **Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

PRIMARY ELECTIONS. See **Constitutional Law**, VI, 1–2; **Libel**, 1.

PRIORITIES. See **Bankruptcy Act.**

PRISONERS. See **Constitutional Law**, VII, 3; **Procedure**, 15.

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PRIVACY OF APPLICANTS. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

PRIVATE CONDUCT. See **Constitutional Law**, VI, 1; **Libel**, 1.

PROBABLE CAUSE. See **Arrests**; **Constitutional Law**, VII, 1, 4–5; **Injunctions**, 4; **Jurisdiction**, 5; **Procedure**, 10, 14.

PROCEDURE. See also **Abstention**; **Administrative Procedure**, 1–3; **Antitrust Acts**; **Constitutional Law**, I, 2; II, 2; VII, 1–5; VIII, 1–2; **Criminal Appeals Act**, 1–2; **Damages**; **Declaratory Judgments**; **Divorce**; **Evidence**, 1–2; **Federal-State Relations**; **Forfeitures**, 1–2; **Habeas Corpus**; **Indigents**, 1–3; **Injunctions**, 1–4; **Jurisdiction**, 1, 3–6, 8–9; **Labor-Management Reporting and Disclosure Act**, 1–2; **Labor Unions**; **National Labor Relations Act**; **Public Schools**; **Punishment**; **Releases**; **Statute of Limitations**; **Stay**; **Water Rights**, 1–2.

1. *Abstention—Equal protection claim—State constitutional issue.*—District Court mistakenly relied on *Monroe* v. *Pape*, 365 U. S. 167, and *McNeese* v. *Board of Education*, 373 U. S. 668, in refusing to abstain from deciding case on merits pending resolution by state courts of state constitutional claims that might obviate need for determining Fourteenth Amendment issue. Askew v. Hargrave, p. 476.

2. *Accrual of causes of action—Unfair labor practices—Remand.*—Case remanded for further consideration, in light of *Zenith Radio Corp.* v. *Hazeltine Research, ante*, p. 321, of questions involving accrual of causes of action under § 303 of the Labor Management Relations Act and § 4 of the Clayton Act. Mine Workers v. Railing, p. 486.

3. *Changed circumstances—Summary eviction procedure—New legislation and removal from premises.*—Intervening legislation and removal of appellants from premises make it inappropriate to resolve challenge by indigent appellants to summary eviction procedure, since it cannot be determined to what extent adjudication of these issues would be material to any further litigation ensuing on remand. Sanks v. Georgia, p. 144.

4. *Constitutional challenge—Remand—Retrial.*—Since, notwithstanding petitioner's constitutional challenge to legality of arrest and search incident thereto at each stage, respondent made no attempt to show that magistrate had more information than was presented in complaint, he may not attempt to do so now on remand; and writ must issue unless State appropriately arranges to retry petitioner. Whiteley v. Warden, p. 560.

5. *Death of petitioner—Direct review—Federal criminal convic-*

PROCEDURE—Continued.

tion.—Death pending direct review, whether by certiorari (as here) or appeal, of a federal criminal conviction, abates all previous prosecutive proceedings. Durham v. United States, p. 481.

6. *Declaratory judgments—Federal-state relations—State criminal prosecution.*—Same principles that govern propriety of federal injunctions of state criminal proceedings govern issuance of federal declaratory judgments in connection with such proceedings, and appellants here should have been denied declaratory relief without consideration of the merits of their constitutional claims. Samuels v. Mackell, p. 66.

7. *Electronic eavesdropping—Informer—Admissibility of evidence.*—Court of Appeals' holding that evidence of incriminating statements of respondent that were overheard by warrantless electronic eavesdropping by Government agents by means of transmitter which informer consented to wear during meetings with respondent was inadmissible under Fourth Amendment, is reversed. United States v. White, p. 745.

8. *Enjoining state criminal prosecution—Federal-state relations—Irreparable injury.*—District Court made no finding that threat to appellees' federally protected rights "[could] not be eliminated by [their] defense against a single criminal prosecution," to meet the great and immediate irreparable injury requirement before a federal injunction of state criminal proceedings can properly issue. Judgment therefore vacated and case remanded. Byrne v. Karalexis, p. 216.

9. *Federal and state courts—Injunctions—Criminal prosecutions.*—Federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances where danger of irreparable loss is both great and immediate in that there is a threat to plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution. Younger v. Harris, p. 37; Samuels v. Mackell, p. 66; Dyson v. Stein, p. 200.

10. *Federal-state relations—Injunctions—Declaratory judgments.*—Since no appellee suffered, or was threatened with great and immediate irreparable injury and the future application of the statute was merely speculative, the District Court was not warranted in interfering with state law enforcement by issuance of an injunction or declaratory judgment. Boyle v. Landry, p. 77.

11. *Federal-state relations—State criminal prosecution—Suppression order.*—Three-judge court erred in issuing suppression order and thereby stifling then-pending good-faith state criminal proceed-

PROCEDURE—Continued.
ing during which the defense should first raise its constitutional claims. Perez v. Ledesma, p. 82.

12. *Limitations and release defenses—Waiver—Discretion of judge.*—Trial judge did not abuse his discretion here if his rejection of the limitations and release defenses was based on respondent's waiver due to untimeliness of their presentation. Zenith Radio Corp. v. Hazeltine Research, p. 321.

13. *No Miranda warnings—Evidence—Impeachment.*—Statement inadmissible against defendant in prosecution's case in chief because of lack of procedural safeguards required by *Miranda* v. *Arizona*, 384 U. S. 436, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack credibility of defendant's trial testimony. Harris v. New York, p. 222.

14. *Retroactivity—Search and seizure.—Chimel* v. *California*, 395 U. S. 752, is inapplicable to searches antedating that decision, regardless of whether case is on direct or collateral review or involves state or federal prisoners. Hill v. California, p. 797.

15. *Retroactivity—Search and seizure—Incident to arrest.*—Court of Appeals' holding that intervening decision in *Chimel* v. *California*, 395 U. S. 752, narrowing scope of permissible searches incident to arrest, was not to be retroactively applied to searches antedating the date it was decided, is affirmed. Williams v. United States, p. 646.

16. *Retroactivity—Self-incrimination—Gambling tax.*—Decisions in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, which held that gamblers had the Fifth Amendment right to remain silent despite the statutory requirement that they submit reports which could incriminate them, have retroactive effect in a forfeiture proceeding under 26 U. S. C. § 7302. United States v. U. S. Coin & Currency, p. 715.

17. *Retroactivity — Self-incrimination — Use of wagering tax forms.*—Court of Appeals' holding that *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, would not be applied retroactively to overturn earlier income tax evasion conviction based on then-constitutional principles permitting introduction in evidence of wagering tax forms, is affirmed. Mackey v. United States, p. 667.

18. *Right to counsel—Indigents—Retroactivity.*—On this record petitioner proved he was without counsel due to indigency at time of his conviction, and accordingly he is entitled to relief as *Gideon* v. *Wainwright*, 372 U. S. 335, is fully retroactive. Kitchens v. Smith, p. 847.

19. *Summary judgment—Full hearing—Florida's overall educa-*

PROCEDURE—Continued.

tional program.—Since manner in which Florida's overall educational program operates may be critical in resolving the equal protection claim, that claim should be decided not by summary judgment but after a full hearing. Askew v. Hargrave, p. 476.

20. *Supreme Court rules—Timeliness of petition.*—On facts here, where petitioner filed for certiorari within three weeks of notification of Court of Appeals' denial of petition for rehearing several months before, waiver of Rule 22 (2)'s time requirement for filing petition for certiorari is proper. Durham v. United States, p. 481.

PROFESSIONAL COMPETENCE. See **Attorneys**, 1, 4.

PROFESSORS. See **Federal-State Relations; Injunctions**, 1; **Jurisdiction**, 3; **Procedure**, 9.

PROGRESSIVE LABOR PARTY. See **Federal-State Relations; Injunctions**, 1; **Jurisdiction**, 3; **Procedure**, 9.

PROMOTIONS. See **Civil Rights Act of 1964**, 1–2.

PROOF. See **Antitrust Acts; Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

PROPERTY TAXES. See **Abstention; Procedure**, 1, 19.

PROSECUTIONS. See **Declaratory Judgments; Federal-State Relations; Injunctions**, 1–2, 4; **Jurisdiction**, 3; **Procedure**, 6, 9–10.

PROSPECTIVITY. See **Constitutional Law**, VII, 3–5; VIII, 1–2; **Forfeitures**, 1–2; **Indigents**, 3; **Jurisdiction**, 5; **Procedure**, 14–18.

PROTECTIVE WAGE CLAUSE. See **Antitrust Acts; Evidence**, 2; **Jurisdiction**, 6; **Labor Unions.**

PUBLIC LANDS. See **Jurisdiction**, 8–9; **Water Rights**, 1–2.

PUBLIC OFFICIALS. See also **Constitutional Law**, VI, 1–3; **Libel**, 1–2.

False newspaper story—Libel suit—Fitness for office.—Charge of criminal conduct against public official or candidate for public office, no matter how remote in time or place, is always "relevant to his fitness for office" for purpose of applying rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, of knowing falsehood or reckless disregard of truth. Ocala Star-Banner Co. v. Damron, p. 295.

PUBLIC PARKS. See **Administrative Procedure**, 1–3.

PUBLIC SAFETY. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

PUBLIC SCHOOLS.

Rules and regulations—Length of schoolboys' hair.—Motion to vacate Court of Appeals' stay of District Court's order enjoining El Paso public school authorities from enforcing rules regarding length of hair is denied, as JUSTICE BLACK refuses to hold, or predict that this Court will hold, that federal courts have the constitutional power to interfere in this way with the public school system operated by the States. Karr v. Schmidt (BLACK, J., in chambers), p. 1201.

PUNISHMENT. See also **Constitutional Law,** II, 2; **Indigents,** 2.

Nonpayment of traffic fines—Imprisonment.—It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it. Tate v. Short, p. 395.

QUALIFICATIONS FOR EMPLOYMENT. See **Civil Rights Act of 1964,** 1–2.

QUESTIONNAIRES. See **Attorneys,** 1–4; **Constitutional Law,** III, 1.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964,** 1–2.

RADIO BULLETINS. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

RADIO TRANSMITTERS. See **Constitutional Law,** VII, 2; **Procedure,** 7.

RAILROAD TRAINMEN. See **Constitutional Law,** V.

RAPE. See **Courts-Martial; Jurisdiction,** 2.

REAL PROPERTY. See **Procedure,** 3.

RECKLESS DISREGARD OF TRUTH. See **Constitutional Law,** VI, 1–3; **Libel,** 1–2; **Public Officials.**

RECORD. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

REDUCTION OF DAMAGES. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

REFEREES IN BANKRUPTCY. See **Bankruptcy Act.**

REFUSAL TO ANSWER QUESTIONS. See **Attorneys,** 1–4; **Constitutional Law,** III, 1.

REFUSAL TO BARGAIN. See **National Labor Relations Act.**

REGIONAL DIRECTORS. See **National Labor Relations Act.**

REGISTRATION AS GAMBLER. See **Constitutional Law,** VIII, 1–2; **Forfeitures,** 1–2; **Procedure,** 16–17.

REGISTRATION OF FIREARMS. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

REGULATIONS. See **Banks**; **Criminal Appeals Act**, 1–2; **Standing to Sue.**

REGULATORY STATUTE. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

REHEARINGS. See **Procedure**, 5, 20.

RELEASES. See also **Damages**; **Procedure**, 12; **Statute of Limitations.**

Coconspirators—Intention of parties.—Effect of release upon coconspirators is to be determined in accordance with intention of the parties, and here respondent, which was neither a party to the release nor a parent or subsidiary of a party, is not entitled to the benefit of the release, as the agreement to exchange releases provided that they were "to bind or benefit" the party and "the parent or subsidiaries of the party giving or receiving such release." Zenith Radio Corp. v. Hazeltine Research, p. 321.

RELEVANCY. See **Constitutional Law**, VI, 1–2; **Libel**, 1.

RELIEF. See **Declaratory Judgments**; **Federal-State Relations**; **Injunctions**, 1–2, 4; **Jurisdiction**, 3; **Procedure**, 6, 9–10; **Stay.**

RELIGIOUS BELIEFS. See **Constitutional Law**, III, 2–3; **Selective Service Act.**

REMAND. See **Arrests**; **Constitutional Law**, VII, 1; **Procedure**, 2, 4.

RENT. See **Procedure**, 3.

REOPENING OF RECORD. See **Damages**; **Procedure**, 12; **Releases**; **Statute of Limitations.**

REPORT OF CIVIL RIGHTS COMMISSION. See **Constitutional Law**, VI, 3; **Libel**, 2.

REPRESENTATION PROCEEDINGS. See **National Labor Relations Act.**

REQUIREMENTS FOR BAR ADMISSION. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

RESERVED WATER RIGHTS. See **Jurisdiction**, 8–9; **Water Rights**, 1–2.

RESIDENCE. See **Citizenship**; **Constitutional Law**, IV; **Habeas Corpus**; **Jurisdiction**, 4.

RETROACTIVITY. See **Constitutional Law**, VII, 3–5; VIII, 1–2; **Courts-Martial**; **Forfeitures**, 1–2; **Indigents**, 3; **Jurisdiction**, 2, 5; **Procedure**, 14–18.

REVIEW. See **National Labor Relations Act**; **Procedure**, 5.

RIGHT TO COUNSEL. See **Criminal Appeals Act**, 1–2; **Evidence**, 1; **Indigents**, 3; **Procedure**, 13, 18.

RIGHT TO PRIVACY. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

RIVER SYSTEMS. See **Jurisdiction**, 8–9; **Water Rights**, 1–2.

ROBBERY. See **Constitutional Law**, VII, 4–5; **Indigents**, 3; **Jurisdiction**, 5; **Procedure**, 14, 18.

RULES. See **Procedure**, 20; **Supreme Court.**

RULES AND REGULATIONS. See **Public Schools.**

ST. BERNARD PARISH. See **Jurisdiction**, 1; **Procedure**, 11.

SANCTIONS. See **Stay.**

SCHOOL DISTRICTS. See **Abstention**; **Procedure**, 1, 19.

SCHOOLS. See **Public Schools.**

SCIENTER. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

SCOPE OF SEARCHES. See **Constitutional Law**, VII, 3; **Procedure**, 15.

SCREENING SYSTEM. See **Attorneys**, 1–4; **Constitutional Law**, III, 1.

SEARCH AND SEIZURE. See **Arrests**; **Constitutional Law**, VII; **Jurisdiction**, 5; **Procedure**, 4, 7, 14–15.

SEATTLE. See **Stay.**

SECRETARY OF TRANSPORTATION. See **Administrative Procedure**, 1–3.

SECTARIAN AFFILIATIONS. See **Constitutional Law**, III, 2–3; **Selective Service Act.**

SECURITIES. See **Banks**; **Standing to Sue.**

SECURITIES AND EXCHANGE COMMISSION. See **Banks**; **Standing to Sue.**

SECURITY. See **Courts-Martial**; **Jurisdiction**, 2.

SELECTIVE CONSCIENTIOUS OBJECTORS. See **Constitutional Law**, III, 2–3; **Selective Service Act.**

SELECTIVE SERVICE ACT. See also **Constitutional Law,** III, 2–3; **Criminal Appeals Act,** 1–2.

Conscientious objectors—Exemptions—Participation in war in any form.—Exemption for those who oppose "participation in war in any form" applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Gillette v. United States, p. 437.

SELECTIVE SERVICE REGULATIONS. See **Criminal Appeals Act,** 1–2.

SELF-INCRIMINATION. See **Constitutional Law,** I, 1; VIII; **Evidence,** 1; **Forfeitures,** 1–2; **National Firearms Act,** 1–2; **Procedure,** 13, 16–17.

SELLING SECURITIES. See **Banks; Standing to Sue.**

SENATORIAL CANDIDATES. See **Constitutional Law,** VI, 1–2; **Libel,** 1.

SENTENCES. See **Constitutional Law,** II, 2; **Indigents,** 2; **Punishment.**

SERVICE CONNECTED. See **Courts-Martial; Jurisdiction,** 2.

SERVICEMEN. See **Courts-Martial; Habeas Corpus; Jurisdiction,** 2, 4.

SHERIFFS. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

SHERMAN ACT. See **Antitrust Acts; Damages; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions; Procedure,** 12; **Releases; Statute of Limitations.**

SOCIAL SECURITY TAXES. See **Bankruptcy Act.**

SOLICITATION OF LEGAL BUSINESS. See **Constitutional Law,** V.

SPECULATIVE DAMAGES. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

SPORTS. See **Stay.**

STANDARD OF PROOF. See **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions.**

STANDARDS FOR JOBS. See **Civil Rights Act of 1964,** 1–2.

STANDARDS OF REVIEW. See **Labor-Management Reporting and Disclosure Act,** 1–2.

STANDING. See **Federal-State Relations; Injunctions,** 1; **Jurisdiction,** 3; **Procedure,** 9.

STANDING TO SUE. See also **Banks.**

Investment companies—National banks—Competition.—Association of open-end investment companies and several individual such companies do not lack standing to challenge whether national banks may legally enter a field in competition with them. Investment Co. Institute v. Camp, p. 617.

STATEMENTS. See **Evidence,** 1; **Procedure,** 13.

STATE PRISONERS. See **Constitutional Law,** VII, 3; **Procedure,** 15.

STATE PROSECUTIONS. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

STATUTE OF LIMITATIONS. See also **Damages; Procedure,** 12; **Releases.**

Tolling—Government antitrust suit—Conspirators.—Court of Appeals erroneously rejected petitioner's claim that statute of limitations was tolled during pendency of Government's antitrust suit against other participants in patent pool, since claim of tolling need not be set forth until limitations claim is raised, where, as here, petitioner has no reason to anticipate raising of limitations claim, and under 28 U. S. C. § 16 (b) the statute is tolled against all participants in conspiracy that is the object of Government suit, whether or not they are named as defendants or conspirators therein. Zenith Radio Corp. v. Hazeltine Research, p. 321.

STAY. See also **Public Schools.**

Antitrust laws—Basketball player draft rules—Playoff games.—Equities between parties favor reinstatement of District Court's preliminary injunction, which will enable applicant basketball player to play and thus further Seattle's efforts to qualify for the imminent playoffs, and should it be necessary that court can fashion appropriate relief in light of outcome of litigation and athletic competition. Haywood v. National Basketball Assn. (DOUGLAS, J., in chambers), p. 1204.

STOCK FUNDS. See **Banks; Standing to Sue.**

STOLEN PROPERTY. See **Constitutional Law,** VII, 4–5; **Jurisdiction,** 5; **Procedure,** 14.

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SUBSTANTIAL-EVIDENCE TEST. See **Administrative Procedure,** 1–3.

SUMMARY EVICTIONS. See **Procedure,** 3.

SUMMARY JUDGMENT. See **Abstention; Procedure,** 1, 19.

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SUPPLEMENTAL WATER ADJUDICATIONS. See **Jurisdiction,** 8–9; **Water Rights,** 1–2.

SUPPORT AND MAINTENANCE. See **Constitutional Law,** II, 1; **Decedents' Estates.**

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1. Amendments to Rules of Civil Procedure, p. 1017.
2. Amendments to Rules of Criminal Procedure, p. 1025.
3. Amendments to Federal Rules of Appellate Procedure, p. 1029.
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5. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Tenth Circuit, p. 927.

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SYNDICATED COLUMNS. See **Constitutional Law,** VI, 1; **Libel,** 1.

TAX ASSESSORS. See **Constitutional Law,** VI, 2; **Libel,** 1; **Public Officials.**

TAXES. See **Abstention; Bankruptcy Act; Constitutional Law,** VIII, 1–2; **Forfeitures,** 1–2; **Procedure,** 1, 16–17, 19.

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TEMPORARY DUTY ORDERS. See **Habeas Corpus; Jurisdiction,** 4.

TENANTS. See **Procedure,** 3.

TESTIMONY. See **Constitutional Law,** VII, 2; **Evidence,** 1; **Procedure,** 7, 13.

TESTS. See **Civil Rights Act of 1964,** 1–2.

TEXAS. See **Constitutional Law,** II, 2; **Indigents,** 2; **Injunctions,** 1–2; **Procedure,** 9; **Punishment.**

THREE-JUDGE COURTS. See **Declaratory Judgments; Federal-State Relations; Injunctions,** 1–4; **Jurisdiction,** 3; **Procedure,** 6, 8–10.

TIMELINESS. See **Procedure,** 20.

TIME MAGAZINE. See **Constitutional Law**, VI, 3; **Libel**, 2.

TOLLING OF STATUTE. See **Damages; Procedure**, 12; **Releases; Statute of Limitations.**

TRAFFIC OFFENSES. See **Constitutional Law**, II, 2; **Indigents**, 2; **Punishment.**

TRANSFER OF FIREARMS. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

TRANSPORTATION UNION. See **Constitutional Law**, V.

TRAVEL ACT. See also **Gambling.**

Gambling operation—Out-of-state bettors.—Conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of 18 U. S. C. § 1952, the Travel Act. Rewis v. United States, p. 808.

TREBLE-DAMAGE CLAIMS. See **Damages; Procedure**, 12; **Releases; Statute of Limitations.**

TRIALS. See **Courts-Martial; Damages; Jurisdiction**, 2; **Procedure**, 12; **Releases; Statute of Limitations.**

TRUSTEES IN BANKRUPTCY. See **Bankruptcy Act.**

TRUST FUNDS. See **Bankruptcy Act.**

TRUSTWORTHINESS. See **Evidence**, 1; **Procedure**, 13.

UNDERCOVER AGENTS. See **Evidence**, 1; **Procedure**, 13.

UNFAIR LABOR PRACTICE. See **National Labor Relations Act; Procedure**, 2.

UNIFORM CODE OF MILITARY JUSTICE. See **Courts-Martial; Jurisdiction**, 2.

UNIONS. See **Antitrust Acts; Constitutional Law**, V; **Evidence**, 2; **Jurisdiction**, 6; **Labor-Management Reporting and Disclosure Act**, 1–2; **Labor Unions; National Labor Relations Act; Procedure**, 2.

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UNIT DETERMINATIONS. See **National Labor Relations Act.**

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UNJUST WARS. See **Constitutional Law**, III, 2–3; **Selective Service Act.**

UNREGISTERED FIREARMS. See **Constitutional Law**, I, 1; VIII, 3; **National Firearms Act**, 1–2.

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UNTIMELINESS. See **Damages; Procedure,** 12, 20; **Releases; Statute of Limitations.**

VAGUENESS. See **Attorneys,** 1–4; **Constitutional Law,** III, 1; **Federal-State Relations; Injunctions,** 1; **Jurisdiction,** 3; **Procedure,** 9.

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WAGE AGREEMENTS. See **Antitrust Acts; Evidence,** 2; **Jurisdiction,** 6; **Labor Unions.**

WAGERING TAX FORMS. See **Constitutional Law,** VIII, 2; **Procedure,** 17.

WAIVER. See **Damages; Procedure,** 12; **Releases; Statute of Limitations.**

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WARRANTLESS ARRESTS. See **Constitutional Law,** VII, 4–5; **Jurisdiction,** 5; **Procedure,** 14.

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WARRANTS. See **Arrests; Constitutional Law,** VII, 1; **Procedure,** 4.

WATER POLLUTION. See **Jurisdiction,** 7.

WATER REFEREES. See **Jurisdiction,** 8; **Water Rights,** 1.

WATER RIGHTS. See also **Jurisdiction,** 8–9.

1. *Joinder of United States—Jurisdiction—Monthly adjudications.*—State statutory proceedings are within scope of 43 U. S. C. § 666 and reach all claims in their totality, although the adjudication is made on a monthly basis. U. S. v. District Court for Water Div. No. 5, p. 527.

2. *Joinder of United States—Jurisdiction—Reserved rights.*—Section 666 (a) of Title 43 U. S. C. is an all-inclusive provision subjecting to general adjudication in state proceedings all rights of the United States to water within a State's jurisdiction regardless of how they were acquired. Any conflict between adjudicated rights and reserved rights of the United States, if preserved in the state proceeding, can ultimately be reviewed in this Court. U. S. v. District Court for Eagle County, p. 520.

WITHDRAWALS FROM PUBLIC DOMAIN. See **Jurisdiction**, 8–9; **Water Rights**, 1–2.

WITHHELD TAXES. See **Bankruptcy Act.**

WITNESSES. See **Constitutional Law**, VII, 2; **Procedure**, 7.

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"Participation in war in any form." § 6 (j) Military Selective Service Act of 1967, 50 U. S. C. § 456 (j) (1964 ed., Supp. V). Gillette v. United States, p. 437.

WORKING OFF FINES. See **Constitutional Law**, II, 2; **Indigents**, 2; **Punishment.**

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